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IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1980

ALABAMA DAIRY COMMISSION AND ASSOCIATED MILK PRODUCERS, INC.,

Petitioners

vs.

DELVIEW MEADOW GOLD DIVISION, BEATRICE FOODS COMPANY, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED[1]

(1) Whether the Court below erred by holding in terms of "due process" that it was not within the power of the Alabama Dairy Commission to adopt a milk classification and producer pricing structure based on "usage and/or sales" which contains, in substance, the following features: Farmers shipping milk to a milk distributor are paid a "Class I price" for that portion of milk which the Distributor sells for consumption as fluid milk; when for all other milk (normally used for cheese and milk by-products) the farmer is paid a much lower "Class II" or "surplus" price. If a Distributor chooses to manufacture

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[1] Additional parties who are respondents to this petition are: Baker and Sons Dairy; Barber Pure Milk Company, Birmingham, Inc.; Barber Pure Milk Company, Mobile, Inc.; Barber Pure Milk Company, Montgomery, Inc.; Cloverleaf Dairies; Consolidated Dairies; Dairy Fresh Corporation; Dairyland Farms Division, Beatrice Foods Company; Deep South Creamery; Farmbest, Inc., Montgomery; Meadow Gold Dairies of Ala.Division, Beatrice Foods Company; Perry's Pride, Inc.; Tro-fe Dairy Division, Beatrice Foods Company; Turner Sales Company, Inc.; White Dairy Company, Inc.

his buttermilk from milk powder (which is not purchased from the farmer) rather than from fresh milk purchased from the farmer, then a portion of the farmer's otherwise "surplus" milk must be paid for at the higher Class I price, such portion being equal to the amount of the Distributor's sales of buttermilk made from powder. Tit. 22, Sec. 223(1), Code of Alabama 1940 (Recomp. 1958), as amended.

(2) Whether the Court below erred in terms of "due process" in holding that the Alabama Dairy Commission lacked authority under Tit. 22, Sec. 223(1), Code, supra, to promulgate an order that in effect requires Distributors to pay the premium Class I price for milk not used in a premium product. Delview Meadow, etc. vs. Ala. Dairy Com'n,Ala., 383 So.2d 511, 517 (1979).

(3) Whether the Court below erred in holding that Alabama Dairy Commission Order 2-76 deprives Distributors of their proerty, money, in a manner that is arbitrary and unreasonable so as to constitute a "due process" violation. Delview Meadow, etc. vs. Ala. Dairy Com'n, supra, at 517.

(4) The Court below erred in its adherence to and misapplication of Appeal of Arcadia Dairy Farms, Inc. , 289 N.C. 456,

223 S.E.2d 323 (1976) as the basis for a finding of a denial of "due process". Delview Meadow, etc. vs. Ala. Dairy Com'n, supra, at 517.

(5) The Court below erred in its reliance upon Kass vs. Brannan, 196 F.2d 791 (2d Cir., 1951) in finding a "due process" violation. Delview Meadow, etc. vs. Ala. Dairy Com'n, supra, at 517.

(6) The Court below erred in that concurrence in the result reached by four justices of the Supreme Court of Alabama is not required by principals of comity in adherence to the decision of the U.S. Fifth Circuit Court of Appeals' view of the Federal constitutionality of the regulation of which Alabama Dairy Commission Order 2-76 was an amendment. Delview Meadow, etc. vs. Ala. Dairy Com'n, supra, at 517-518.

(7) The Court below erred in holding that the unconstitutionality of Alabama Dairy Commission Order 2-76 relates back to the date of its adoption. Delview Meadow, etc. vs. Ala. Dairy Com'n, supra, at 517.

(8) The Court below erred in remanding the case for consideration of the "due process" issue which issue had been

previously considered and finally adjudicated by the Supreme Court of Alabama. Delview Meadow, etc. vs. Ala. Dairy Com'n, supra, at 514.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Alabama Dairy Commission (hereinafter referred to as "ADC") and Associated Milk Producers, Inc. (hereinafter referred to as "AMP"), Petitioners, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama. Delview Meadow, etc. vs. Ala. Dairy Com'n, Ala., 383 So.2d 511 (June 30, 1978; reh. den. August 4, 1978; after remand September 28, 1979; reh. den. May 9, 1980).

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 383 So.2d 511, a copy of which is attached hereto as Appendix "A". Also attached hereto as Appendix "B" in order to give the full background of the appellate review by the Supreme Court of Alabama of ADC Order 2-76 is a copy of the initial decision by the Supreme Court of Alabama upholding said regulation as lawful which decision is reported as Alabama Dairy Commission v. Delview Meadow Gold Division, Beatrice Foods Company, et al., Ala., 345 So.2d 278 (1977).

JURISDICTION

The judgment and decision of the Supreme Court of Alabama, attached as Appendix "A", was initially rendered on June 30, 1978, ordering remand of the case for a ruling by the trial Court on the "due process" issue; the petition for rehearing thereof by ADC and AMP was denied on August 4, 1978; the further decision of the Supreme Court of Alabama after remand was rendered on September 28, 1979; and the application for rehearing thereof by ADC and AMP was denied on May 9, 1980. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The "due process" clauses of Sec. 1 of the Fourteenth Amendment of the United States Constitution and of Article I, Secs. 6 and 13 of the Alabama Constitution of 1901 are the constitutional provisions in issue. In addition this controversy concerns ADC Order 2-76 (Supreme Court of Alabama, S.C. 2716, Appdx. 1-4), and the enabling statutes,

Alabama Dairy Commission Act, Tit. 22, Sec. 205 et seq., Code of Alabama 1940 (Recomp. 1948), as amended.

STATEMENT OF THE CASE

This case involves the constitutional validity of ADC Order 2-76, adopted by the Alabama Dairy Commission on January 16, 1976 (Supreme Court of Alabama, S.C. 2716, Appdx. 1-4). The subject regulation was adopted by the ADC pursuant to its powers under Tit. 22, Sec. 223(1), Code, supra, to fix the prices for and classify milk within the State of Alabama. The regulation was adopted by the ADC against the background that the peak demand for milk by distributors (milk plants which manufacture fluid milk and milk by-products) occurs in the fall and winter months, this season sometimes being referred to as the "short" season. This "short" season is also the period of the year when, for biological reasons, the cows milk production is the lowest. Conversely, during the spring and summer months, sometimes referred to as the "flush" season the cows are biologically equipped for maximum milk production,

but this is also the period when the consumers' demand for milk is at its lowest. The farmer is therefore under constant pressure from the Distributors to increase his productive capacity and plan his production so as to have milk available during the short season to meet the needs of the Distributors, but in order to do this, there necessarily have to be larger surpluses during the flush season. Historically in Alabama the farmer is paid for this "surplus" milk at a far lower price (the Class II price) than that which he has paid for milk actually consumed as fluid milk (the Class I price).

The respondent milk plants in this cause (hereinafter referred to as "Distributors") had for a number of years before the adoption of ADC Order 2-76 engaged in the practice of manufacturing buttermilk from a milk powder by reconstituting such powder. Buttermilk can be made either from fresh skim milk purchased from farmers or from such powdered milk. Powdered milk for such manufacturing purpose is not purchased from farmers, but from other sources for a price roughly comparable to the lower Class II price. Distributors who made buttermilk from fresh skim milk pay

the farmer the Class I higher price for the skim milk, but Distributors using powder pay the farmer nothing. As a result of this practice at a time when the farmers are making every effort to increase their production so as to meet the Distributors' wintertime needs, the Distributors refused to use the farmers' summertime surplus in the making of buttermilk. As a result of this practice the farmers were required to sell their milk at the lower Class II price. The ADC concluded that if milk production in Alabama was to be stimulated the farmer must be provided a market for some of his summertime surplus, and to do this, he must be permitted to share to some extent in the profits from buttermilk realized by the Distributors.

The answer to this problem was easy to find, because the United States Department of Agriculture many years ago adopted a pricing structure which alleviates this problem. It is simply this: If the Distributor receives surplus milk from the farmer, the Distributor can use it in making buttermilk or not as he sees fit, but if he sells fluid milk made from powder, he must pay for an

equivalent portion of the farmer's surplus milk as though such surplus milk had been used to make the buttermilk, i.e., at the Class I price. By adopting ADC Order 2-76, the ADC exercised its price fixing and classification powers in favor of increasing the price (from Class II to Class I) which the Distributor must pay the farmer for a portion of the "surplus" milk shipped by the farmer, such portion being measured by the amount of the plant's sales of buttermilk made from powder. This ADC Order 2-76 has been commonly known (and will hereinafter be referred to) as the "buttermilk regulation."

After the adoption of the buttermilk regulation by the ADC, the Distributors sought review of the regulation by a statutory certiorari proceeding in the trial Court. On April 7, 1976 the trial Court declared the "buttermilk regulation" invalid. An appeal was taken by the ADC and AMP to the Supreme Court of Alabama and on April 15, 1977 the Supreme Court of Alabama reversed and remanded, holding that the regulation was lawful and valid. On remand to the trial Court an escrow fund which had been established to receive from the Distributors the difference between

what was actually paid to farmers and what would have been paid under the "buttermilk regulation" was ordered disbursed. The escrow fund at the time of the disbursement was approximately 1.2 million dollars from which AMP received, as marketing agent for its cooperative members, approximately $730,000.00. While the case was pending in the trial Court following its initial remand, the Distributors filed motions seeking to prevent the disbursement of the escrow fund and seeking to raise constitutional questions concerning the "buttermilk regulation". The motions of the Distributors were denied by the trial Court. The Distributors then took an appeal to the Supreme Court of Alabama and pending said appeal filed motions in the Supreme Court of Alabama seeking to stay the disbursement of the escrow fund pending the completion of the appeal. The Supreme Court of Alabama denied such motions for a stay and the fund was disbursed in September 1977.

The appeal of the Distributors resulted in the decision of the Supreme Court of Alabama which is the subject of this petition for Writ of Certiorari. In the first portion of its decision rendered on June 30, 1978 the Supreme Court of Alabama declined

to consider the "commerce clause" and "equal protection" contentions of the Distributors but determined that it would remand the case tc the trial Court for consideration and decision of the merits of the Distributors' "due process" claims (see Appdx. A hereto). Rehearing sought by the ADC and AMP was denied on August 4 1978. Thereafter the trial Court on remand rendered its decree on March 12, 1979, holding that the "buttermilk regulation" did not violate the "due process" provisions of the United States and Alabama Constitutions. After that decision on remand, the Supreme Court of Alabama on September 28, 1979 rendered its decision reversing and declaring the "buttermilk regulation" a violation of the "due process" provisions of the United States and Alabama Constitutions.

The Alabama Dairy Commission is the State milk regulatory agency. Associated Milk Producers, Inc. is a dairy cooperative which acts as marketing agent for its farmer-members whose numbers during the present litigation have ranged from 400 to 600 individuals.

With certain exceptions hereinafter covered in the succeeding sections of this

petition the recitation of the regulatory provisions and background in the opinions of the Supreme Court of Alabama attached as Appendices "A" and "B" provide the other necessary factual information for consideration of the questions presented by this petition.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because:

(1) It decided a federal question of the application of the "due process" clause to a state milk classification regulation in a way in conflict with the decision of a Federal Court of Appeals or of a three-judge court.

(2) It decides an important question of federal law as to the application of the "due process" clause to a state milk classification regulation (which is in effect identical to the classification provisions of federal milk marketing orders promulgated by the Secretary of Agriculture under 7 USC 601 et. seq.) which has not been, but should be, settled by this Court.

(3) It decides a federal question as to the application of the "due process"

clause to a state milk classification regulation in a way in conflict with applicable decisions of this Court.

(4) It so far departs from the accepted and usual course of judicial proceedings in ignoring the doctrine of res judicata as to call for an exercise of this Court's power of supervision.

ARGUMENT

I.

The decision below decided a federal question of the application of the "due process" clause to a State milk classification regulation in a way in conflict with the decisions of federal courts of appeal (or their three-judge panel equivalents when direct appeal was available) and with applicable decisions of this Court. The Supreme Court of Alabama therefore erred in terms of "due process" in holding that it was beyond the power of the ADC to adopt the "buttermilk regulation" and that it deprived the distributors of their property in an arbitrary and unreaonsable manner (Questions Presented, Nos. 1, 2 & 3).

The adoption of the "buttermilk regulation" was a permissible exercise of statutory authority granted to the ADC. Titl 22, Sec. 223(1), Code, supra. The nub of the attach by the Distributors below on the regulation was their philosophical and economic disagreement with the policy of the "buttermilk regulation." The "due process contention" of the distributors and the holding of such

a violation by the Court below are totally without merit in today's world of regulatory systems at every hand. The substance of such a constitutional challenge has been fully treated by the three-Judge Court's opinion in Baxley v. Alabama Dairy Commission, 360 F. Supp. 1159 (1973) where the Court said:

"I. DUE PROCESS CLAIMS

"[1] Indicative of the weight to be given plaintiffs' due process challenges to Alabama's regulatory scheme is the Supreme Court's treatment of similar claims in Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 84 S.Ct. 378, 11 L.Ed. 2d 389 (1964). While reversing a lower court holding that a state regulatory scheme did not impose an unreasonable burden on interstate commerce, the Court in Polar Ice Cream relegated to a footnote its dismissal of the due process challenge to the regulatory scheme, noting merely that the claims 'appear on their face to be without merit...' 375 U.S. at 370 n, 7, 84 S.Ct. at 384. These claims, as the lower court opinion in Polar Ice Cream reveals, see 208 F. Supp. 899 (N.D. Fla. 1962), included many of the same objections presently before this Court. Because plaintiffs press their due process claims so earnestly, however, it is appropriate to spell out in detail why each of their claims, in light of intervening legislative and administrative revision

of Alabama's regulatory scheme, is without merit." Id. at 1161.

The Baxley v. Alabama Dairy Commission Court refused "to reenter a constitutional thicket which was abandoned by Federal Courts over three decades ago -- that of substantive due process in economic regulation," and said:

> "Since Nebbia, the Court has consistently adhered to a laissez faire attitude toward state economic and social legislation. Indeed, to the extent that Nebbia left open the possibility of judicial review of regulatory schemes claimed to be unreasonable, the Nebbia decision itself can be said to have been narrowed, and perhaps altogether undermined, by subsequent decisions. In Olsen v. Nebraska ex rel. Western Ref. Bond Ass'n., 313 U.S. 236, 61 S. Ct. 862, 85 L.Ed 1305 (1940), for example, the Court, through Mr. Justice Douglas, unanimously rejected an argument that certain legislation should be struck down for lack of any conditions which the legislature might reasonably believe would rebound to the public injury unless corrected by such legislation. The Court's opinion appears to have equated that argument with questioning the wisdom, need or appropriateness of the legislation and rejected such inquiry as inappropriate." Id. at 1161.

The mistaken conception that due process authorizes courts to hold laws or regulations unconstitutional when they

believe the legislature or its delegated agency has acted unwisely has long since been discarded. Baxley v. Alabama Dairy Commission, 360 F. Supp. 1159, 1162; Alabama Dairy Commission v. Food Gaint, Ala., 357 So.2d 139 (1978). The distributors wholly failed below in carrying their burden in the same fashion as plaintiffs failed in Baxley v. Alabama Dairy Commission, supra, where the Court said:

> "[2] To the extent that Nebbia 'reasonableness' test does survive it is clear that the test is exceedingly narrow and that in drawing legislative judgment into question, a court must restrict its inquiry to the issue of whether any state of facts whether known or which could reasonably be assumed affords support for that legislative judgment. See United States v. Carolene Products, Co., 304 U.S. 144 58 S. Ct. 788, 82 L.Ed. 1234 (1938). As the Court in Olsen remarks, there is no necessity for the state to demonstrate that evils persist. Rather, the party challenging the legislation bears the heavy burden of establishing the complete absence of any state of facts which the legislature might reasonably believe would redound to the public injury unless regulated." Id. at 1162; emphasis added.

The heavy burden which the distributors failed to carry under the foregoing authorities by a showing of the absence of

any state of facts upon which the ADC may have relied in adopting the "buttermilk regulation" is found in the statement of the purpose of the Alabama Dairy Commission Act and the legislative findings of fact and declaration of policy found at Title 22, Sec. 205, Code, supra, Recomp. 1958, as follows:

> "§205. Supervision and regulation of milk supply a proper function of state government. -- It is hereby declared that milk is a necessary article of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and that the production, transportation, processing, storage, distribution and sale of milk, in the State of Alabama, is an industry affecting the public health and interest; and that unfair, unjust destructive and demoralizing trade practices have been and are now being carried on in the production, marketing, sale, processing and distribution of milk, which constitute a constant menace to the health and welfare of the inhabitants of this state and tends to undermine sanitary regulations and standards of content and purity, that health regulations alone are insufficient to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this state to promote, foster and encourage the intelligent production

and orderly marketing of commodities necessary to its citizens, including milk, and to stabilize marketing of such commodities; that fluid milk is a perishable commodity easily contaminated with harmful bacteria, which cannot be stored for any great length of time, and which must be produced and distributed fresh daily, which supply cannot be regulated from day to day, but, due to natural and seasonal conditions fluctuates from day to day; that this surplus of milk though necessary and unavoidable unless regulated tends to undermine and destroy the fluid milk industry; that investigation and experience has shown that, due to the nature of milk and the conditions surrounding its production and marketing, that unless the producers, distributors and others engaged in the marketing of milk are guaranteed and insured a reasonable profit on milk, that both the supply and quality of milk are affected thereby to the detriment of and against the best interest of the citizens of this state whose health and well being are vitally affected thereby; that where no supervision and regulation is provided for the orderly marketing of milk, past experience has shown that in flush seasons of production, when surplus milk is great and the price which producers and others are able to obtain for milk is below the cost of production, that oftimes milk strikes invade the market followed by bombings and bloodshed, which oftimes prevents the consuming public from receiving an adequate supply of pure and wholesome milk necessary for

its health and well being; that, due to the nature of milk and the conditions surrounding its production and marketing that the natural law of supply and demand has been found inadequate to protect the industry in this and other states of the United States, and that, in the public interest, it is necessary to provide state supervision and regulations of the fluid milk industry of this state. The foregoing statement of facts, policy and application of this law are hereby declared a matter of legislative determination. (1939, p. 267)" Emphasis added.

The ADC in adopting the regulation clearing acted within that permitted statutory purpose and has, among other items, considered statutory factors such as, "that the production and maintenance of an adequate supply of healthful milk...is vital to the public health and welfare" (See Finding of Fact No. 7, Supreme Court of Alabama, SC 2716, App. 2); "that unfair....trade practices have been and are now being carrried on in the...marketing, sale, processing and distribution of milk" (See Finding of Fact Nos. 3 & 5, Supreme Court of Alabama, SC. 2716, App.2, dealing with loss to producers of a reasonable share of sales of fluid buttermilk processed from powder and the disparity in costs among distributor licensees); and the statutory recognition

of natural and seasonal fluctuations creating at times surplus milk which unless regulated in its production and marketing in terms of insuring a reasonable profit price for both "producers" and distributors" "tends to undermine and destroy the fluid milk industry" and affect "both the supply and quality of milk...to the detriment of and against the best interest of the citizens of this state" (See Finding of Fact Nos. 3,5, 6,7 & 8, Supreme Court of Alabama, SC 2716, App. 2 dealing with the need to stimulate milk production in Alabama by reclassifying certain surplus milk the price of which is measured by buttermilk sales while at the same time allowing reasonable profits to both distributors and producers).

What the distributors are really seeking is protection against the hazards of competition under a permissible milk price classification regulation pertaining to buttermilk. However, the "due process" clause does not provide such protection from competition. Although factually distinguishable another three-Judge Federal Court in Southeast Milk Sales Association, Inc., v. Swaringen, 290 F. Supp. 292 (M.D. N.C. 1968) has rejected similar due process arguments by the plaintiff dairy cooperative

in that litigation. The Swaringen court said the following:

"III. Due Process and Equal Protection

"...Southeast in this action in effect complains about competition by North Carolina distributors and that the regulations have the result of making it difficult for it to carry out a plan which it deems would be economically better for its members. What was said in Hegeman Farms Corp. v. Baldwin, 239 U.S. 163, 55 S.Ct. 7, 79 L.Ed. 259 (1934), a case factually quite distinguishable from the subject case, is appropriate here. There the court states:

"'The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit, ...The Fourteenth Amendment does not protect a business against the hazards of competition.'

"In Hegeman Farms Corp., the plaintiff, a wholesale milk dealer was complaining among other things, about the minimum selling prices set for milk dealers. Less drastic than price setting for dealers are the provisions of Order No. Two, about which the plaintiff complains, as the privisions simply provide for an equitable method of allocating among producers the available proceeds from milk which has been sold by the distributors.

"[3, 4] Insofar as the requirements of due process are concerned, it is

> required that the laws or regulations be reasonable, not arbitrary or capricious, and that the means selected have a real and substantial relation to the object to be attained. "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.' Nebbia v. People of State of New York, supra.
>
> "[5] We think the challenged provision of Order No. Two are not so arbitrary and capricious as to constitute a violation of due process. The provisions have a direct and reasonable relation to the accomplishment of a proper legislative purpose--to promote, in an industry vital to the public health and welfare of the people, the production, transportation, processing, storage, distribution and sale of milk in a fair, just and equitable manner with pure and wholesome content." Id. at 304-305; emphasis added.

The constitutional principles on "due process" adhered to in Swaringen, supra, are the same as those applied by the three-judge Court in Baxley v. Alabama Dairy Commission, supra, and by the Supreme Court of Alabama in Alabama Dairy Commission v. Food Giant, Inc., supra. The "buttermilk regulation" like the North Carolina regulation in Swaringen, supra, although factually distinguishable in its operation,

"simply provides for an equitable method of allocating among producers the available proceeds from milk which has been sold by the distributors." Swaringen, supra, at 304. The distributors who complain of the buttermilk regulation are no more entitled under the Fourteenth Amendment to be protected against the hazards of competition than was the producer cooperative in Swaringen, supra.

The decision of the Court below that the ADC lacked authority to adopt the "buttermilk regulation" is further contrary to the applicable law as expressed by the Supreme Court of Alabama itself in Alabama Dairy Commission v. Food Giant, Inc., Ala., 357 So.2d 139 (1978) where it upheld as constitutional the delegation of legislative authority to the ADC to fix prices and rejected "due process" attacks under both the State and Federal Constitutions against the price fixing and related activities of the ADC. In addition, and of great importance in this particular case, the decision of the Court below is both inconsistent and contrary to its own initial decision in this very case, Alabama Dairy Commission v. Delview Meadow Gold, Ala., 345 So.2d 278 (1977) wherein this Court recognized the authority of the ADC, stating:

"However, it is apparent from a close reading of Dark's Dairy that this Court did not hold in that case that a milk regulatory Commission was powerless, under all fact situations, to classify and regulate the price of buttermilk made from powder." Id.279.

The Supreme Court of Alabama expressly held in its initial decision (345 So.2d 278) in this cause that factual findings were supported by the record and that the classification and pricing action of the Commission in Order 276 were authorized by the Alabama Dairy Commission Act under which its later decision (383 So.2d 511, 517) says the Commission lacks such authority:

"[1] These findings are supported by the record and justify the classification and pricing action taken by the Commission, acting pursuant to the authority granted it by Section 20 of Act No. 408, Acts of Alabama, 1971, p. 1097, [carried as Title 22, Sec. 223(1), Code of Alabama, 1940, Recompiled, 1958, (1973 Cumulative Supplement)], ..." 345 So.2d 278, 280.

It is difficult to conceive based upon the previous careful consideration of the record and issues in this cause, as reflected in this initial decision of the Court below (345 So.2d 278) how it could reach the opposite conclusion that there was a lack of authority under the applicable statute

for the promulation of this classification regulation. Such a decision is clearly erroneous.

Nor does the "buttermilk regulation" deprive "distributors of their property, money, in a manner that is arbitrary and unreasonable" (383 So.2d 511, 517). This holding below is precisely opposite of the conclusion a majority of the Court below reached in finding the regulation "reasonable" in its initial decision (345 So.2d 278) where it stated:

> "If Order 2-76 is invalidated, it is reasonable to assume that the previous inequitable and inconsistent pricing system for buttermilk would continue under which a distributor would share a regulated wholesale price for buttermilk, whether made from powder or fresh skim milk, but would have an unregulated raw product cost, thereby throwing substantial quantities of fresh skim milk into the Class II price, and consequently injuring the producers. Order 2-76 attempted to remedy this inequity and inconsistency, and also attempted to stimulate milk production in Alabama. We find Order 2-76 is reasonable." (Emphasis added) Alabama Dairy Commission v. Delview Meadow Gold, supra, 281.

What has changed? Surely the regulation is the same regulation as was before the Court below when it initially found the regulation "reasonable". Surely the

uncontradicted testimony that Alabama is and was a "deficit" milk producing state has not changed. Surely the need to stimulate milk production in and for Alabama recognized by the Court below in its initial decision has not changed. Alabama Dairy Commission v. Delview Meadow Gold, supra, at 281. Most certainly, as Justice Maddox has stated in his dissenting opinion of September 28, 1979, Delview Meadow, etc. v. Ala. Dairy Commission, supra, the law of the land that a state may guarantee through milk regulations a fresh, wholesome supply of milk --- a legitimate consumer interest --- has not changed. Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L.Ed. 940 (1934).

Surely the Court below has not abandoned its bedrock principle in cases reviewing regulations of administrative agencies as stated in its first opinion in this very case:

> "It is not the duty of the courts to devise the scheme for regulating the fluid milk industry. That job belongs to the Alabama Dairy Commission." Alabama Dairy Commission v. Delview Meadow Gold, supra, 281.

This principle was emphatically endorsed in Alabama Dairy Commission v. Food Giant, Inc., Ala., 357 So.2d 139, 142-143 (1978), which

recognized the mandate of Nebbia v. New York, supra.

The Supreme Court of Alabama also recognized in Alabama Dairy Commission v. Food Giant, Inc., supra, that a regulation of this type is presumed correct unless the Court is convinced beyond a reasonable doubt of its unconstitutionality. 357 So.2d 139, 142. In the context of this regulation, the Court in order to find a "due process" violation must find that the regulation bears no "reasonable relation to a proper legislative purpose" and that it is "arbitrary" or "discriminatory". Nebbia v. New York, supra, and Alabama Dairy Commission v. Food Giant, Inc., supra. How can the Supreme Court of Alabama be convinced beyond a reasonable doubt that such a burden has been sustained by the distributors when it has repeatedly upheld milk regulations, recognizing that the production and distribution of milk is a business which vitally affects the public. Alabama Dairy Commission v. Food Giant, Inc., supra; State v. Dixie Dairies Corp., 268 Ala. 480, 107 So.2d 896 (1959). The stimulation of milk production in Alabama by a milk classification system of this type clearly bears a reasonable relation to a proper legislative purpose within the meaning of

Nebbia v. New York, supra. The Court below has recognized that the regulation meets this test by its understanding of the previous inequitable system and the production stimulus which the new buttermilk regulation provided. Alabama Dairy Commission v. Delview Meadow Gold, Ala., 345 So.2d 278, 281. Further, how can the Court below make such a finding of "arbitrariness" or of a "discriminatory" regulation when in its first opinion in this very case it judicially found that "Order 2-76 is reasonable". Alabama Dairy Commission v. Delview Meadow Gold, Ala., 345 So.2d 278, 281.

Since the rendition of the initial decision of the Court below on April 15, 1977 and its denial of rehearing on May 20, 1977, Alabama Dairy Commission v. Delview Gold, supra, there has been no further evidence submitted which could in any manner serve as the basis for change in this Court's construction of the regulations as "reasonable" or in the view there expressed that the Alabama Dairy Commission has the authority to promulgate the regulation. Indeed the record before the Supreme Court of Alabama was precisely the same record as developed in the administrative hearings before the Alabama Dairy Commission, which

record was fully considered and served as the basis for its finding of the "reasonableness" of the regulation in its initial decision. The present opinion of the Court below rendered September 28, 1979 finding the same regulation on the same record to be "unreasonable" is wholly inconsistent with its former opinion and cannot be reconciled. If the regulation was "reasonable" in the first instance, it cannot be other than that upon subsequent review upon the same evidence and record.

II.

The opinion of the Court below rendered September 28, 1979, (383 So.2d 511, 516) relies heavily on Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976) in holding that the ADC was without authority under Title 22, Sec. 223 (1), Code of Alabama, 1940 (Recomp. 1958) to promulgate Order 2-76, and to conclude that its adoption was thus a violation of due process (Questions Presented , No. 4). In doing so, the Court below has apparently equated the statute there under consideration, GS106-266.8, N.C. Code (See 223 S.E.2d 323, 328) with the Alabama provision, Title 22,

Sec. 223 (1), Code, supra. It is clear from a reading of the two code provisions that they are not in fact the same and cannot be so equated. The specific portion of the North Carolina statute which the Supreme Court of North Carolina found potentially wanting (See 223 S.E.2d 323, 331) appears to be GS106-266.8 (10)a, providing:

> "(10)a. The Commission, after investigation and public hearing, may fix prices to be paid producers and/or associations of producers by distributors in any market or markets, and may also fix different prices for different grades or classes of milk."

The Alabama statute, Title 22, Sec. 223 (1), Code, supra, is, in the first place, much broader and goes beyond merely allowing the commission to fix prices paid producers or producer associations as the North Carolina statute is limited and allows a classification system in Alabama based upon plant usage, plant sales of fluid milk [defined to include buttermilk] or a combination of both systems, as follows:

> "When in the judgment of the dairy commission, it is necessary or advisable, due to seasonable fluctuations or other unstable conditions, in order to promote a proper balance between the supply of and the demand for milk, to fix a lesser minimum price for milk which is produced in excess of

what is needed for fluid milk consumption, the dairy commission may establish the quantity of milk for which the distributor or milk dealer shall pay the fluid or base milk price, and may establish a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption. For this purpose, the dairy commission may compute said quantity upon a uniform system of plant usage, classifying milk according to its various usage and estabishing different minimum prices which the milk dealer or distributor shall pay for each classification, or the dairy commission may, if it deems it most advisable, establish a base surplus system, placing all milk sold by a plant for fluid milk consumption, including all milk as definded in the definition of fluid milk in one classification, establishing in a minimum price therefor and all milk processed by such distributor or milk dealer into by-products into another classification, and fixing a lesser minimum price for said surplus milk so used in the by-products classification, or the commission may use a combination of both systems." (Emphasis added)

In the second place, the Court below has also ignored or misconstrued the crucial element of Arcadia, supra, that gave rise to the obiter dictum therein speculating on the potential due process defect which would exist if the North Carolina statute were interpreted to allow the North Carolina

Dairy Commission "to require a distributor of 'reconstituted' milk to make such payments for the benefit of producers with whom it has no dealings . . . ". (Emphasis added) 223 S.E.2d 323, 332. That is simply not the case under Order 2-76 as a plain reading of it will show in the light of the uncontroverted evidence that Alabama was a "deficit" milk producing state, and that the failure to regulate the distribution and sale of buttermilk would aggravate this situation to the ultimate detriment of the public. Alabama Dairy Commission v. Delview Meadow Gold, 345 So.2d 278, 280. Unlike Alabama's "deficit" milk supply situation, the Ashville market of North Carolina under consideration in Arcadia, supra, was a surplus milk market. 223 S.E.2d 323, 326. In addition to that distinction, and even more important, under the Alabama regulation, Order 2-76, the farmers are "having dealings with" and furnishing milk to the distributors who are required to make payment under Order 2-76. The Alabama farmer is entitled under Order 2-76 to be paid the Class I price based on quantities of buttermilk sold by the distributor only if the farmer ships to the distributor an amount of milk equivalent to the distributor's sales of

buttermilk. The question of whether such milk "is not used in making buttermilk" (Delview Meadow Gold v. Alabama Dairy Commission, supra, at 517) is not the relevant inquiry. It is the price and classification of milk actually delivered by the farmer to the distributor that is being regulated. This situation is entirely different from that in Arcadia, supra, where the potentially offending "due process" issue concerned the feature of the equalization fund which required distributors manufacturing buttermilk from reconstituted powder to pay into a fund which in part benefited farmers from which the distributor had purchased nothing and whom it had no business dealings. 223 S.E.2d 323, 328, 332. In Alabama, under Order 2-76, it is the price of milk actually delivered that is being regulated. The amount of the distributor's sales of buttermilk made from powder is merely being used as the measure of how much of the milk delivered by the farmer will be paid for at the premium Class I price, rather than at the lower Class II price. This is entirely within the Commission's price fixing power and within its power to establish classifications of milk based on plant usage, plant sales or both.

The underlying "trade off" for the system established by Order 2-76 is the equity in allowing the farmers to share in the sales of buttermilk, by receiving the Class I price for equivalent raw milk when buttermilk is made from powder, in return for the farmer's often "Herculean" efforts of capital investment and work to acquire peak herd production to meet the distributors demands in the "short" supply season (Fall and Winter) without being penalized by payment for substantial quantities of surplus milk from his herd in the "flush" supply season (Spring and Summer) when the farmer cannot simply turn off the "spigot" on his herd in response to the distributors then-reduced demands.

Order 2-76 adjusts this inequity for only those farmers who have business dealings with and delivery of milk to distributors. Those farmers who have no such relationship and dealings are not benefited by the regulation. This, Arcadia does not concern the issue which was before the Court below and it has misconstrued and misapplied the Arcadia rationale in accepting it as persuasive authority.

III.

The Court below has also relied upon Kass v. Brannan, 196 F.2d 791 (2nd Cir. 1951) in construing the "buttermilk regulation" to impose a tax or penalty for the use of milk powder by the distributors as a basis for finding a due process solution (Questions Presented, No. 5). The Court has misconstrued that decision and has merely lifted out of it the language with surface appeal concerning a "tax or penalty." A careful reading of Kass v. Brannan, supra, will show clearly that it has no bearing on the "due process" issue. It was not a case involving a "due process" question. There is no mention of "due process" in the opinion of the Second Circuit. Rather it merely construes a particular pricing order promulgated by the Secretary of Agriculture in a Federal Order jurisdiction and finds that the particular order was inconsistent with the applicable portion of the Agricultural Marketing Agreement Act that minimum prices for each use classification be uniform as to all handlers. Even if this case were otherwise relevant to the "due process" question, it would not be controlling in that the

objectionable feature of the Federal Order was an additional payment required to be made by the handler (distributor) to the producer (farmer) for milk not delivered. This is a similar deficiency to that found by the North Carolina Supreme Court in Arcadia, supra. In Kass v. Brannan, supra, this distinguishing feature from the instant "buttermilk regulation" is made clear by the court's summary of the question there under consideration:

> "His attack is directed to auxiliary provisions, namely Sec. 927.9(h), printed in the margin. In brief these auxiliary provisions provide that handlers of non-pool milk and non-pool milk products disposed of in the marketing area are required to make payments to producers, through the producer settlement fund. The purpose of these provisions is, in the words of Mr. Weldon, a witness at the promulgation hearing, 'to insure that the minimum cost [of non-pool milk, cream, etc.] to handlers is the same as the regular class price to handlers of milk received at pool plants.***' The effect is to add an additional cost to the original price of the non-pool milk or milk product which is paid by the handler, not to the seller or original producer, but to the regular suppliers of the New York market who did not deliver the milk to him." Id. at 793-794; emphasis added.

We have already covered in the preceding Section of this argument the clearly distinguishable feature of the buttermilk regulation in that it does not operate to require payment by the distributor for milk that is not supplied by the farmer. Thus, the buttermilk regulation simply is not equivalent to the order in either Kass v. Brannan, supra., or that in Arcadia, supra, and is not a tax or penalty so as to violate "due process"

IV.

The decision below erred in finding a "due process" violation on the theory that the buttermilk regulation is "arbitrary and unreasonable" (383 So.2d at 517). It decides an important question of federal law as to the application of the "due process" clause to a state milk classification regulation (which is in effect identical to the classification of buttermilk under Federal Milk Marketing Orders promulgated by the Secretary of Agriculture) which has not been, but should be, settled by this Court.

Most of those parts of the United States which are not within the jurisdiction of a state milk regulatory agency are within the jurisdiction of a Federal milk

marketing order. In these areas, commonly known as "Federal Order Markets", the minimum prices required to be paid by distributors to producers, and the accounting for milk shipped by producers to distributors, is closely regulated by the United States Department of Agriculture. The U.S.D.A. holds hearings establishes producer prices, establishes a milk classification system, monitors the accounting between producers and distributors, promulgates regulations, and generally carries out some of the same functions carried out by the Alabama Dairy Commission within the State of Alabama, all pursuant to the Agricultural Marketing Agreement Act of 1937. 7 USC 601 et. seq.

From the applicable Alabama statutes discussed in preceding sections, Title 22, Sec. 205, 210 and 223, Code, supra, it is clear that the Dairy Commission has ample authority to classify fluid milk products based on sales or usage or a combination of both features. Order 2-76 is no different in effect with regard to buttermilk classification than Federal Milk Orders promulgated by the Secretary of Agriculture. For example, see the Federal Order for Southeastern Minnesota and Northern Iowa which classifies buttermilk in the same fashion.

Marigold Foods, Inc., v. Butz, 493, F.2d 60, 1974). Federal Order No. 7 of the United States Department of Agriculture, Agriculture, Agriculture Marketing Service, reprinted from the Federal Register of May 6, 1974 for the Georgia Marketing area (7 C.F.R., Chapter X. Pt. 1007) of which this Court may take judicial notice, is similar to the Federal Order in Marigold Foods, supra.

The idea for the "buttermilk regulation", which requires that distributors' sales of buttermilk be accounted for as Class I sales, regardless of whether made from powder or fresh skim, was borrowed from the Federal order regulations such as Georgia's on this subject. This regulation (in Sec. 1007.40) provides for Class I, II and III milk. Class I milk is, in effect, defined as any "fluid milk product" not specifically made Class II or Class III milk, and "fluid milk product" is defined (in Sec. 1107.15) as "milk, skim milk, low-fat milk, milk drinks, buttermilk,...including any such products that are...reconstituted.." (Emphasis added). Thus, we see that the disputed regulation of the Alabama Dairy Commission, rather than being an unreasonable and arbitrary violation of the

due process clause of the Fourteenth Amendment is merely a plagiarism of the same identical procedure followed by the United States Department of Agriculture. Although the U.S.D.A. has been requiring that buttermilk be accounted for as a Class I sale (regardless of whether made from powder or fresh skim) for many years, there have been no cases declaring such classification system to be a violation of the due process clause of the Fourteenth Amendment to the Untied States Constitution, or invalidating it for any other reason. As will be hereafter shown, the Federal courts hold such system to be valid. The adoption by a state regulatory agency of the same classification system used by the United States Department of Agriculture (Supreme Court of Alabama, SC 2716, Exh. 8, App.30, 5558, 62) constitutes convincing evidence that the ADC has not acted "unreasonably" or "arbitrarily". Substantially the same classification system is also used by the state regulatory agencies of Oregon and Virginia (Supreme Court of Alabama, SC 2716, Exh. 8, Appdx. 55).

The action of the Dairy Commission in Order 276 is substantially equivalent to that of the Secretary of Agriculture held

valid in a slightly different context in Mills v. Freeman, 294 F.Supp. 119 (1968) where a milk handler sought to recover certain payments which it had been required to make to the producers' settlement fund. Summary judgment was granted in favor of the Secretary of Agriculture and the District Court held that the fact that powder and cream which the milk handler converted into fluid milk were bought by the handler from a broker-distributor engaged in buying and selling milk products (rather than directly from producers) under a milk marketing order would not permit the handler to avoid paying the differential in question to the producer settlement fund after the handler had converted such powder and cream into Class I milk, since the powder and cream were made from milk that the co-operative had accounted for under the order as Class II milk, and that to allow the handler to avoid paying the differential under these circumstances would undercut the blend price. The District Court stated:

> "The order in this case does not attempt to charge any compensatory payment upon powder or cream brought into this area and used as such in this area. The compensatory payment is applied only to powder or cream from outside the area if and when

such powder or cream is converted into Class I fluid milk, and sold as such in the area. A similar payment is charged when Class II powder or cream from within the area are similarly converted and sold. No discriminatory charge is imposed on powder or cream coming into the area from outside."

The distributors would merely have the Court substitute their own view that the particular buttermilk regulation is unwanted, uneconomical or unwarrented for the judgment of the lawfully constituted expert regulatory authority, the Alabama Dairy Commission. No matter the distributors' desires in this matter and no matter what the position of the Court might have been if it had to pass on the buttermilk regulation as the lawfully constituted milk regulatory authority, there is no power to strike the regulation down as unconstitutional in view of the right of the State through the Alabama Dairy Commission to promote the general good over the individual good in the sphere of economic regulation of milk, and, so long as the pricing structure with regard to buttermilk was not arbitrary, capricious and unreasonable as it clearly was not. See Sylan Seal Milk, Inc. v. Milk Control Commission of the Commonwealth of Pennsylvania, 270

F. Supp. 117 (1967).

V.

The Court below erred in holding that the unconstitutionality of the "buttermilk regulation" relates back to the date of its adoption (383 So.2d at 517) and such result is in conflict with decisions of this Court. Two of the Justices below concurred in the result of the four man plurality only on principles of comity, relying upon the decision in Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (1978), which held Alabama's milk quota regulations in ADC Order 3-75-1, to which Order 2-76 was an amendment, unconstitutional on "commerce clause" grounds. The decision in Dairymen, Inc. v. Alabama Dairy Commission, supra, did not have as an issue and did not in any fashion address "due process" or the "buttermilk regulation". It dealt only with the "delivery" and "acceptance" requirements of the "quota" regulation which it found to violate the "commerce clause."

Even if the amendatory "buttermilk regulation" was rendered of no future effect by the decision in Dairymen, Inc., supra, or by the subsequent issuance of an injuction by the Dairymen, Inc. trial court, it

is clear from the context of the dispute in that case that the "parent" regulation's (Order No. 3-75-1) invalidity dates prospectively from the issuance of the appellate opinion or trial court injunction.

In any event, the actual existance of a statute or regulation such as Order No. 3-75-1 and Order 2-76 prior to a determination that it is unconstitutional is an operative fact having consequences which cannot justly be ignored. Rights acquired under a statute or regulation while it is duly adjudged to be constitutional are valid legal rights which cannot be justly ignored. Such rights are valid legal rights which are themselves protected by the constitution, not by judicial decision. See 16 Am.Jur.2d, Constitutional Law, Sec. 178, p. 405. The constitutional validity of the predecessor quota regulation (A.D.C. Order No. 2-72-1) to Order 3-75-1 was recognized in Baxley v. Alabama Dairy Commission, supra, and the constitutional validity of the quota regulation, A.D.C. Order 3-75-1, the subject of Dairymen, Inc., supra, and its enabling statute, Title 22, Sec. 205, Code, supra, were upheld by the Supreme Court of Alabama in Alabama Dairy Commission v. Food Giant, Inc., supra, on February 10, 1978, while the appeal of this very case

was pending. Moreover, the Supreme Court of Alabama on September 8 and 12, 1977, expressly denied stays sought by the Distributors and allowed disbursement of the "Buttermilk escrow fund" then in existence in the face of the same "due process" contentions later made the basis of its recent decision. Pursuant to those orders of the Supreme Court of Alabama approximately 1.2 million dollars of the escrow fund proceeds was paid to several hundred dairy farmers on September 19, 1977. Also, pursuant to such orders allowing disbursement of the fund and in accordance with the trial court's additional orders $190,000.00 attorney's fees were paid on October 11, 1977, and have likewise been received and disbursed by the receiving attorneys. That award of attorney's fees is the subject of a separate appeal (SC 77-70) which is still pending before the Supreme Court of Alabama.

Clearly the prior judicial declarations of the constitutional validity of the A.D.C.'s milk classification regulations and its enabling statutes, Alabama Dairy Commission v. Food Giant, Inc., supra; Baxley v. Alabama Dairy Commission, supra; State v. Dixie Dairies Corp., 268 Ala. 480, 107 So.2d 896 (1959) and Franklin v. State ex rel. Alabama

State Milk Control Board, 232 Ala. 637, 169 So.295 (1936) as well as the Supreme Court of Alabama's own orders of September 8 & 12, 1977, allowing payment of the escrow fund are operative facts having consequences which cannot justly be ignored. Certainly one such consequence is that the Distributors may not collaterally attack judicially endorsed payments to hundreds of needy farmers on the strength of the Federal Court's decision in Dairymen, Inc., supra, which has no bearing on the "due process" issue and is confined solely to its "commerce clause" holding.

Because the decision in Dairymen, Inc. v. Alabama Dairy Commission, supra, and the subsequent implementing order of the U.S. District Court dated January 26, 1979, do not require invalidation of the quota regulation of which the buttermilk regulation is an amendment from the date of the quota regulation's adoption, the Supreme Court of Alabama should have adhered to the rule that retroactive operation of an overruling decision is neither required nor prohibited by the Constitution and that where there has been justifiable reliance on decisions that have been subsequently overruled, and those who have so relied may be substantially

harmed if retroactive effect is given to the overruling decision, it should not be applied retroactively. Tehan v. Scott, 382 U.S. 406 and Linkletter v. Walker, 381 U.S. 618.

In addition, the opinion of the Court below as to unconstitutionality, should apply prospectively in view of its previous rulings rejecting "due process" arguments urged in support of staying the distribution of the escrow fund in this matter. Needless to say, we agree with the view of Justice Maddox, concurred in by Justice Embry, that the "due process" issue was initially considered by the Supreme Court of Alabama and was improperly remanded to the trial Court for an additional ruling (383 So.2d at 515-516, 518). However, even beyond that aspect of the matter, prospective effect only of any declaration of unconstitutionality is required to have consistency with the Supreme Court of Alabama's previous decisions and orders dated September 8 and 12, 1977, wherein it rejected the same "due process" arguments now relied upon by the distributors.

In reliance upon the express rulings of the Supreme Court of Alabama on the "due process" issue denying any stay of the

disbursement of the accrued escrow fund, said fund was paid and disbursed to the farmers and a portion thereof pursuant to further proceedings was paid as attorneys' fees, received by said attorneys, and disbursed by them. Where these actions were taken based upon the express rejection of "due process" arguments in denying the stay of payment of said fund, it is unconscionable to apply any declaration of unconstitutionality of the buttermilk regulation retroactively. Neither principles of comity nor the decisions of this Court require such a result where such payments were made premised upon a Court's own rejection of "due process" arguments previously urged upon it.

VI.

The Court below erred in taking jurisdiction of this cause for consideration of the "due process" issue which issue had been previously considered and adjudicated (Questions Presented, No. 8) and such action so far departs from the accepted and usual course of judicial proceedings in ignoring the doctrine of res judicata as to call for the exercise of this Court's power of supervision.

It is earnestly submitted that the Court erred in its opinion rendered June 30, 1978 (383 So.2d 511-515) in remanding with directions that the trial Court consider "due process" claims which had already in fact been before both the trial and appellate Court. This writer's research does not reveal any authority which requires either a trial or appellate Court, absent a statutory duty, to expressly address or write to each point raised or theory urged by a party to a proceeding.

Judge Maddox is eminently correct in stating in his dissenting opinion of June 30, 1978 (383 So.2d 515-516) "that arguments on the Federal Constitutional question were initially considered" and "... even though not written to, was an issue in the original appeal and was decided adverse to Delview". The following chronology amply demonstrates the accurateness of Judge Maddox's observations:

(1) The original petition for certiorari contains in grounds 10(q) and (r) the "due process" claims of appellant (Supreme Court of Alabama, SC 2716, Appdx. 19).

(2) The brief of Delview on the

first appeal in this matter (SC 1814) which resulted in the favorable decision upholding the "buttermilk regulation" in Alabama Dairy Commission v. Delview Meadow Gold, et al., 345 So.2d 278 (1977) briefly resurrected the "due process" argument with a single page comment and citation of Appeal of Accadia Dairy Farms, Inc., 223 S.E.2d 323 (SC of N.C. 1976).

(3) In its application for rehearing (SC 1814) ground number 3 urged by Delview specifically alleged a "due process" violation. As Judge Maddox correctly pointed out in his dissent of June 30, 1978, (383 So.2d at 515-516) the brief of Delview is support of its application for rehearing addressed the "due process" claim, again citing Arcadia, supra. The application for rehearing was of course denied.

(4) The same "due process" argument was made by Delview in its brief in support of its "Motion for Stay" of disbursement of the escrow fund filed in this cause, also relying on Arcadia, supra. Delview's motion for stay was denied.

(5) Delview's brief on the merits in the cause (pp. 29-36) resulting in the decision of remand (383 So.2d 511-515) likewise urged its "due process" claims and again

the same contentions are found in its reply brief (pp. 5-7, 11). It is clear that the alleged constitutional "due process" deficiency had already been before the Court below in the initial appeal. Alabama Dairy Commission v. Delview Meadow Gold, supra. In accordance with the usual appellate practice it must be assumed that the issues framed by the appellant Delview in its appellate brief, the equivalent of the complaint in the ordinary case in the trial court, were submitted, considered and ruled upon by the Court in its initial decision in this cause, Alabama Dairy Commission v. Delview Meadow Gold Division, Beatrice Foods Company, et al., 345 So.2d 278 (Ala. 1977). Delview in effect conceded the submission of the "due process" issue and the denial of relief by the Supreme Court of Alabama on that ground in the form of its application for rehearing in the initial appeal which specifically included as ground 3 the alleged "due process" violation. Submission of the "due process" issue in the application for rehearing of the initial decision which upheld the regulation is certainly recognition by Delview that the same issue was before the Court in the merits of the original appeal

in order that such submission thereof properly and necessarily serve as the foundation of Delview's prayer for relief in its application for rehearing that the same "due process" issue be reconsidered and that relief be granted thereon. The Court below denied relief on the "due process" issue as well as upon any of the other grounds relied upon by Delview in its application for rehearing on May 20, 1977. Alabama Dairy Commission v. Delview Meadow Gold, supra.

Absent a statutory requirement that a court accompany its decision with a finding of facts and/or law, such as in Workmen's Compensation proceedings in most trial courts, this writer is unaware of any requirement that a court, especially an appellate court, write in its opinion on each and every issue urged upon it even though it deems such issue without merit. Surely the parties are entitled to rely upon the framing of the issues by the allegations of appellants' brief and the submission of the same as the final submission thereof. The effect of the Court's decision of June 30, 1978 (383 So.2d 511-517) is to make of its portals of justice a "revolving door" and to destroy the orderly process of appellate

litigation, one of the hallmarks of which is the finality achieved by submission of issues such as the "due process" one in this case and the ruling thereon which had already been made in the initial appeal of this cause. 345 So.2d 278, supra. Such action by the Court below in further considering the "due process" issue after it already denied relief in the merits upon that claim is itself a denial of "due process" to the Peittioners, ADC and AMP. This action below also makes a shambles of the doctrine of "res judicata" and calls for the exercise of this Court's supervisory power to remedy the same.

VII.

The Court below erred in that the concurrence of two Justices (383 So.2d 511 at 517-518) on principles of comity in reliance upon Dairymen, Inc. v. Alabama Dairy Commission, supra, is not required (Questions Presented, No. 6) and is in conflict with the decision of this Court in Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed 752 (1939).

The term "comity" means "courtesy" or "respect" or a "a willingness to grant a privilege, not a matter or right, but out of deference and goodwill." Black's Law Dictionary, Fourth Edition, p. 334. Judicial comity is the principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. Black's Law Dictionary, supra. There is no statute or common-law rule by which one court is bound to abide by the decisions of another court of equal rank. It is respectfully submitted that the Supreme Court of Alabama is of equal rank with and is not bound to follow the view

of the U.S. Circuit Court of Appeals for the Fifth Circuit in Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (1978) as stated by the justices concuring in the result of the opinion authored by Justice Faulkner. While the opinions of that Court are entitled to be accorded due respect, they are not controlling on the highest Court of Alabama.

The circumstances in this particular case are compelling that the Supreme Court of Alabama Should follow its own considered views as to the constitutionality of the "buttermilk regulation" in question. It must be recognized that the decision in Dairymen, Inc. v. Alabama Dairy Commission, supra, did not in any manner address or consider the question of whether the buttermilk regulation violated the "due process" provisions of the Constitution of the United States. While it is true that the Fifth Circuit's decision held the quota regulation (of which the buttermilk regulation is an amendment) unconstitutional, such holding had only to do with the provisions of the quota regulation and its enforcement in matters wholly unrelated to the classification system set up by the "buttermilk regulation." The Fifth Circuit's

action was based entirely upon "commerce clause" grounds which were not before the Supreme Court of Alabama in its consideration of the "buttermilk regulation."

Moreover, the Supreme Court of Alabama has itself specifically considered the consittutionality of the quota regulation struck down by the Fifth Circuit in Alabama Dairy Commission v. Food Giant, Inc., supra, and upheld it against "commerce Clause" attack in its decision rendered February 10, 1978. While that decision relied in part upon the ruling of the U.S. District Court for the Middle District of Alabama in Dairymen, Inc. V. Alabama Dairy Commission, 449 F.Sup. 154 (1977) which was subsequently reversed by the U.S. Court of Appeals for the Fifth Circuit (584 F.2d 707) the genesis of the controlling law which required rejection of the "commerce clause" attack is Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939), which continues to be the law of the land as announced by the Supreme Court of the United States. Justice Maddox has correctly characterized the Fifth Circuit decision in Dairymen, Inc., supra, as not following prior decisions of the Supreme Court of the United States in milk regulation matters (383 So.2d

511 at 518). It is not our purpose to re-argue the "commerce clause" matters addressed in the Food Giant and Dairymen, Inc. cases, supra. However the decision of the Supreme Court of Alabama in Food Giant, supra, is of equal value and is entitled to equal respect so that deferral to the Fifth Circuit's view of the quota regulation as a matter of comity is not required. Simply stated the decision of the Fifth Circuit in Dairymen, Inc., supra, is a wrong decision contrary to Milk Control Board v. Eisenberg Farm Products, supra, and is thus not entitled to comity.

CONCLUSION

The decision of the Supreme Court of Alabama that the ADC lacked authority in terms of "due process" to promulgate the "buttermilk regulation" is a wrong decision on an important federal question in conflict with decisions of this Court and lower Federal appellate courts. The regulation is not "arbitrary" or "unreasonable" and is a permissible exercise of the statutory authority of the ADC. Nebbia v. New York, supra. The decision below erroneously applies the opinions in Arcadia, supra, and

Kass v. Brannan, supra.

The absence of "arbitrariness" or "unreasonableness" of the regulation is apparent from the reliance by the ADC on similar Federal Milk Order regulations in adopting the Alabama "buttermilk regulation." The importance of the question of federal law presented in this regard lies in the finding that the Alabama regulation, virtually identical in effect to Federal Milk Orders regulating most of the milk in the United States, is a "due process" violation. Neither this Court nor any lower Federal Court has ruled that such Federal Milk Order provisions are unconstitutional. This decision and its precedental value cannot be allowed to stand without settlement of the question in this Court.

Moreover the Court below violated the "due process" rights of Petitioners in remanding the case for consideration of an issue which had already been submitted and decided and thereafter further considering the merits of such issue. It erred as well in applying principles of comity which ignore the controlling effect of Milk Control Board v. Eisenberg Farm Products, supra, and in giving its decision retroactive application.

Not only are the legal issues involving "due process" and other matters of much importance, but the validity of the regulation also involves the rights of the private parties to the litigation (AMP and the respondent distributors) to the 1.2 million dollar escrow fund which has already been disbursed pursuant to Court orders below and substantial additional like-sums paid directly to farmers or their cooperatives after the disbursement of the escrow fund.

For all of the foregoing reasons this petition is due to be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon Hon. Oakley Melton, Jr., 339 Washington Avenue, Montgomery, Alabama, 36104, and upon Honorable Curtis Springer, 200 S. Lawrence Street, Montgomery, Alabama, Attorneys for Respondents, Delview Meadow Gold, et al., by depositing the same in the U. S. Mail, postage prepaid on this 7th day of August, 1980.

Henry C Chappell Jr.

Of Counsel

APPENDIX "A"

DELVIEW MEADOW GOLD DIVISION BEATRICE FOODS COMPANY et al.

v.

ALABAMA DAIRY COMMISSION and Associated Milk Producers, Inc.

SC 2716.

Supreme Court of Alabama.

June 30, 1978.

Rehearing Denied Aug. 4, 1978.

After Remand Sept. 28, 1979.

Rehearing Denied May 9, 1980.

On review of an order of the Alabama Dairy Commission, the Circuit Court, Montgomery County, William Thetford, J., invalidated buttermilk regulation, and appeal was taken. The Supreme Court, 345 So.2d 278, held that buttermilk regulation was valid, and reversed and remanded. The Circuit Court denied milk distributors' postjudgment motions, and distributors appealed. The Supreme Court held that: (1) it would not consider two additional constitutional contentions for the first time on appeal, but (2) cause would be remanded for consideration of merits of distributors' due process claims. On remand, the Circuit Court, Sam Taylor, J., held that buttermilk regulation did not violate due process, and milk producers again appealed. The Supreme Court, Faulkner, J., held that buttermilk regulation, which required milk distributor who sold buttermilk made from milk powder to pay for equivalent portions of surplus milk he received from farmer-producer just as if such surplus milk had been used in making buttermilk, deprived milk distributors of their property in arbitrary and unreasonable manner in violation of due process of law.

Reversed and rendered.

Maddox, J., filed a dissenting opinion in which Shores and Beatty, JJ., joined, and Embry, J., dissented from the Supreme Court's decision to remand case for consideration of the due process claim.

Shores, J., filed an opinion concurring in the result on the merits of the due process claim in which Beatty, J., joined.

Maddox, J., filed an opinion dissenting on the merits of the due process claim in which Embry, J., joined.

1. **Food** ⇐4.5(6)

Supreme Court would not consider for first time, on appeal from circuit court order denying postjudgment motions by milk distributors to amend their petition for writ of certiorari seeking review of Alabama Dairy Commission order changing classification and pricing structure for buttermilk, claims alleging that order violated commerce and equal protection clauses, since court may only consider evidence placed in first instance upon record developed before Dairy Commission and issues raised thereafter in petition for certiorari to circuit court. Code of Ala., Tit. 22, § 226; U.S.C.A. Const. art. 1, § 8, cl. 3; Amend. 14.

2. **Certiorari** ⇐42(9)

Statute governing procedure for amending petitions for certiorari and permitting amendment of pleadings as often as occasion may require to attain ends of justice, pertains only to amendments while proceedings are in progress, and not to amendments after judgment. Code of Ala., Tit. 7, § 1072.

3. **Food** ⇐4.5(6)

Where milk distributors, in their original petition for certiorari seeking review by circuit court of Dairy Commission order changing classification and pricing structure for buttermilk, raised constitutional "due process" claim, which was not ruled upon by circuit court in suspending operation of Commission's order, and where Supreme Court, in reversing circuit court decision, did not address due process violation or remand cause to circuit court for its consideration thereof, upon review of circuit court order denying distributors' postjudgment motions, Supreme Court would remand cause for consideration by circuit court of merits of distributors' federal and state due process claim. U.S.C.A.Const. Amends. 5, 14; Const.1901, § 6.

4. Food ⇐4.5(6)

Circuit court order which continued escrow fund arrangement and which, upon circuit court's suspension of operation of Dairy Commission order changing classifications and price structure for buttermilk pending final determination on order's validity, required distributors to pay into escrow fund amount equal to difference between what was actually paid to producers, and what would have been paid to them if order were in effect, was not null and void since order did not affect, but was collateral to, matter or question involved in appeal from circuit court decision holding Dairy Commission order invalid.

After Remand

5. Constitutional Law ⇐296(1)

Alabama Dairy Commission order, which provided that if milk distributor received surplus fluid milk from farmer producer, distributor who sold buttermilk made from milk powder had to pay for equivalent portion of surplus milk just as though such surplus milk had been used in making buttermilk, regardless of why buttermilk was made from milk powder, deprived distributors of their property in arbitrary and unreasonable manner in violation of due process of law. (Per Faulkner, J., with the Chief Justice and two Justices concurring and two Justices specially concurring.) Code of Ala., Tit. 22, § 223(1); U.S.C.A. Const. Amend. 14; Const.1901, § 6.

6. Food ⇐4.5(2)

Alabama Dairy Commission had no statutory authority to promulgate order that in effect required milk distributors, who had to pay premium price for milk whenever they made buttermilk from milk powder irrespective of whether they did so for greater profit, convenience, because no fresh milk was available, or only sporadically, to pay premium fluid milk price for milk not used in a premium product. (Per Faulkner, J., with the Chief Justice and two Justices concurring and two Justices specially concurring.) Code of Ala.1975, §§ 2-13-50, 2-13-51; Code of Ala., Tit. 22, § 223(1).

7. Courts ⇐100(1)

Unconstitutionality of buttermilk regulation, which required milk distributor who made and sold buttermilk made from milk powder to pay for equivalent portion of surplus milk received from farmer producer just as though such surplus milk had been used in making buttermilk, related back to date of its adoption and not to date of decision that such regulation deprived milk distributors of property in violation of due process. (Per Faulkner, J., with the Chief Justice and two Justices concurring and two Justices specially concurring.) U.S.C.A. Const. Amend. 14; Const.1901, § 6.

Oakley Melton, Jr., and Curtis H. Springer, Montgomery, for appellants.

Charles M. Crook, Montgomery, for appellee Alabama Dairy Commission.

Henry C. Chappell, Jr., Montgomery, for appellee-intervenor Associated Milk Producers, Inc.

PER CURIAM.

This is an appeal by Delview Meadow Gold Division Beatrice Foods Company and others (hereinafter referred to as Distributors) involving Order 2-76 of the Alabama Dairy Commission. The order was previously declared valid by this court in *Alabama Dairy Commission v. Delview Meadow Gold Division, Beatrice Foods Company et al.*, 345 So.2d 278 (Ala.1977).

Under current regulations promulgated by the Dairy Commission, milk producers are paid a Class I price by milk distributors for that portion of milk sold by the distributors for consumption as fluid milk. A much lower Class II price is paid for other milk purchased from the producers which is usually used in making cheese and other milk products. Order 2-76 changes this classification and pricing structure for buttermilk which is made from milk powder rather than fluid milk.

In making buttermilk, distributors may choose to use either fluid milk or cheaper milk powder. However, under the provi-

sions of Order 2-76, if a distributor receives surplus fluid milk from a producer and the distributor then manufactures and sells buttermilk made from milk powder, he must pay the producer for an equivalent portion of the producer's otherwise surplus milk at the Class I price *as though* such fluid milk had been used in making the buttermilk.

Order 2-76 further provides that distributors may pass increased costs resulting from the regulation on to consumers through an increase in the wholesale price of buttermilk.

The Dairy Commission enacted Order 2-76 on January 16, 1976. On February 9, 1976 the Distributors filed a timely petition for writ of certiorari in the Montgomery County Circuit Court seeking a review of the new regulation. It was alleged that Order 2-76 was invalid and violative of the Due Process Clause of both the state and federal constitutions.

On February 23, 1976 the trial court entered an order suspending the operation of Order 2-76 pending a final determination on its validity. The order further required the Distributors to monthly pay into an escrow fund an amount equal to the difference between what was actually paid to producers and what would have been paid to them if Order 2-76 were in effect.

On April 7, 1976 the Montgomery County Circuit Court declared Order 2-76 invalid as being beyond the powers of the Dairy Commission. The decree was based upon this court's decision in *Dark's Dairy v. Alabama State Milk Control Board*, 278 Ala. 693, 180 So.2d 527 (1965). The Dairy Commission then appealed the circuit court's ruling to this court.

On appeal the Distributors asserted that *Dark's Dairy* was controlling. They further argued the previously asserted "due process" claim as well as alleged violations of the Commerce Clause of the federal constitution and of the "equal protection" provisions of both the state and federal constitutions.

On April 15, 1977 a majority of this court reversed the circuit court's order, holding that *Dark's Dairy* was not controlling, and reversed and remanded the cause. This court did not address the asserted "due process" or "commerce clause" or "equal protection" claims in that opinion. These various constitutional challenges were once again raised in the Distributors' application for rehearing which was denied on May 20, 1977.

The Distributors thereafter filed the following motions in Montgomery County Circuit Court: motion to set case for hearing on constitutional questions; motion to remand to the Dairy Commission; and motion to refund escrow fund (to the Distributors) or, in the alternative, motion to hold entire escrow fund intact pending completion of all judicial proceedings. In addition to these various motions, the Distributors filed an amendment to their original petition for certiorari which once again raised "due process," "commerce clause," and "equal protection" claims.

All motions and the amendment were denied by the trial court on June 16, 1977, and the escrow funds were disbursed. Notice of appeal to this court was filed by the Distributors from the June 16, 1977, order. A motion for summary dismissal was subsequently filed by the Dairy Commission on the grounds that the issues raised on this appeal were before the court in the prior appeal involving Order 2-76. The cause was thus submitted on the motion and the merits.

Briefly stated, the Distributors make the following contentions on this appeal:

(1) Order 2-76 places a substantial burden on interstate trade of milk powder in violation of the Commerce Clause of the federal constitution;

(2) Order 2-76 violates the Distributors' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the federal constitution and similar provisions of the state constitution; and

(3) The June 28, 1976, trial court order was entered at a time when that court was without jurisdiction to make any decree af-

fect[illegible] the rights of the parties and was therefore null and void.

Title 22, section 226, Code of Alabama 1940 (§ 2-13-63, Code 1975), establishes the procedure for review of Dairy Commission orders. This statute provides in pertinent part as follows:

> "§ 226. Certiorari to review.—Any person affected by any order or action of the board, who deems himself aggrieved by any such order or act may within ten days after receiving notice of any such action or order, have such order, or action reviewed by a writ of certiorari by filing in the circuit court of the county wherein said action or order was taken or made, a verified petition setting out the specific order or action, or any part or parts thereof whereby said person deems himself aggrieved, and such court shall only consider such matters as contained in the petition. . . . [N]o new or additional evidence shall be taken or heard by the court. . . . Upon final hearing, such court shall have jurisdiction to reverse, vacate or modify the order complained of, if upon consideration of the issues before the court, the court is of the opinion the order is unlawful or unreasonable."

Under the clear wording of this statute, review by the circuit court of orders of the Dairy Commission must be limited to a consideration of the evidence presented in the hearing before the Dairy Commission and the issues contained in the petition for certiorari. No similar provision is made in Title 22, section 226, nor in any other statute specifically relating to the Dairy Commission, concerning review by this court of circuit court judgments. However, we have stated that on appeal of Dairy Commission actions this court is governed by the same rules of review as was the circuit court. *White Way Pure Milk Company v. Alabama State Milk Control Board*, 265 Ala. 660, 93 So.2d 509 (1957). Thus, in the present appeal, this court may only consider evidence placed in the first instance upon the record developed before the Dairy Commission and issues raised thereafter in the petition for certiorari to the circuit court.

[1] As previously noted, the Distributors did not assert their "commerce clause" and "equal protection" claims in the original petition for certiorari to the circuit court. Thus, under this court's interpretation of our rule of review under Title 22, section 226, we decline to consider these two contentions for the first time on this appeal.

[2] We note that Title 7, section 1072, Code of Alabama 1940 (§ 6-6-640, Code 1975), which governs the procedure for amending petitions for certiorari, states, in pertinent part, the following:

> ". . . any of the pleadings in such proceedings may be amended as often as occasion may require to attain the ends of justice, and by striking out parties and adding new parties; and upon the issues thus presented, the court shall award the relief, if any, to which the petitioner is entitled."

This statute pertains only to amendments while the "proceedings are in progress" and not to amendments after judgment. *Ex parte Hennies*, 33 Ala.App. 229, 34 So.2d 17 (1947).

[3] Although we specifically decline to consider the merits of the Distributors' constitutional challenges to Order 2-76 based upon alleged "commerce clause" and "equal protection" violations, this cause must nevertheless be remanded to the circuit court for its consideration of a single issue—the Distributors' "due process" claim. We reach this result because the Distributors raised this constitutional claim in the original petition for certiorari. When the circuit court ruled that Order 2-76 was invalid, it did not need to address the "due process" issue because it held that *Dark's Dairy* was controlling. Upon review, this court did not address the alleged "due process" violation nor did we remand to the circuit court for its consideration thereof. We therefore believe this cause must be remanded now for a consideration by the circuit court of the merits of the Distributors' federal and state "due process" claim because this issue, though properly present-

ed, has never been ruled upon by either the circuit court or this court.

[4] The final contention made by the Distributors on this appeal, that the circuit court order of June 28, 1976, continuing the escrow fund arrangement created by that court on February 23, 1976, was null and void, is without merit.

"In *Barran v. Roden*, 263 Ala. 305, 307, 82 So.2d 398, 399 (1955), this Court set out a limitation on the rule that, after an appeal is taken, the trial court cannot rule on any matter involving the appeal:

> '. . . The rule is stated to be that after an appeal is taken, the lower court may proceed in matters which are entirely collateral to that part of the case which is taken up (by the appeal) but it can do nothing in respect to any matter or question which is involved in the appeal, and which may be adjudged by the appellate court.' This is a limitation on the rule that after an appeal is taken the trial court cannot, pending that appeal, pass upon any matter involved on the appeal . . .
>
> 'As to those matters which are entirely collateral to the questions involved on appeal, the court and parties are free to proceed notwithstanding the appeal if taken, or without affecting the right to appeal if not then taken. 4 C.J.S. Appeal and Error § 212e, p. 401.'

"Accord: *Francis v. Scott*, 260 Ala. 590, 72 So.2d 93 (1954); *Ex Parte Taylor*, 251 Ala. 387, 37 So.2d 656 (1948); *Ex Parte City Council of Montgomery*, 114 Ala. 115, 14 So. 365 (1896)."

Osborn v. Riley, 331 So.2d 268, 271 (Ala. 1976).

Accordingly, this cause is remanded to the circuit court for a consideration of the Distributors' claim that Order 2-76 violates the Due Process Clause of the federal constitution and similar provisions of the state constitution.

REMANDED WITH DIRECTIONS.

TORBERT, C. J., and BLOODWORTH, FAULKNER, JONES and ALMON, JJ., concur.

MADDOX, J., with whom SHORES and BEATTY, JJ., join, dissents.

EMBRY, J., dissents.

MADDOX, Justice (dissenting).

On the original appeal of this case, *Ala Dairy Com'n v. Delview Meadow Gold, etc.*, Ala., 345 So.2d 378 (1977), Delview spent several pages of its brief arguing that the trial court's order invalidating Order No. 2-76 was correct because "[a] state regulatory agency is prohibited from erecting trade barriers which are clearly a burden on interstate commerce between the several states."

On application for rehearing, Delview argued:

"NUMEROUS LEGAL AND CONSTITUTIONAL ERRORS IN PER CURIAM OPINION

"At the very outset, the per curiam opinion rendered herein permits Order 2-76 of the Alabama Dairy Commission to discriminate against the interstate sale of out-of-state powdered milk to milk distributors in Alabama in violation of the Commerce Clause of the United States Constitution, Article 1, § 10, clause 2 and § 8, clause 3. The per curiam opinion is also contrary to the statutory and case law of Alabama and is contrary to the principles of law enunciated in cases from the Supreme Courts of the States of North Carolina, Florida, Delaware, Pennsylvania, New Jersey, Mississippi, Montana, Kentucky, Arizona and Colorado. The per curiam opinion is also expressly contrary to the decisions of the United States Supreme Court in *Baldwin v. Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032; *Hood v. DuMond*, 336 U.S. [525] 527, 69 S.Ct. 657, 93 L.Ed. 864 [865]; *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329; *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389; and *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76, 82 S.Ct. 1168, 8 L.Ed.2d 345.

"The per curiam opinion would also permit a violation of Appellees' constitutional rights under the due process clauses of the Constitutions of Alabama and the United States. *Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 223 S.E.2d 323.

ORDER 2-76 VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

"Although the constitutional question concerning violation of the Commerce Clause by Order 2-76 was thoroughly argued in briefs, discussed in detail with the Court on oral argument, *and submitted as an issue in this case*, the per curiam opinion fails to mention the Commerce Clause or even attempt to distinguish this case from the foregoing decisions of the United States Supreme Court and the highest Courts of ten sister states. . . ." [Emphasis added.]

I am of the opinion that arguments on the Federal constitutional question were initially considered, but unfortunately, as it turns out, were not addressed by this Court in the original opinion. In other words, I am of the opinion that the Federal constitutional claim, even though not written to, was an issue in the original appeal and was decided adverse to Delview. Therefore, I naturally dissent.

SHORES and BEATTY, JJ., concur.

AFTER REMAND

FAULKNER, Justice.

Order 2-76 of the Alabama Dairy Commission (the buttermilk regulation") is before us again. Delview Meadow Gold appeals from an order of the Circuit Court of Montgomery County which held that Order 2-76 did not violate the due process provisions of the United States and Alabama Constitutions. We reverse.

On June 30, 1978, this case was remanded to the Circuit Court with directions that the court consider the claim made by Delview Meadow Gold and other distributors of dairy products that Order 2-76 of the Alabama Dairy Commission (ADC) violated the due process clause of the United States Constitution and similar provisions in the Alabama Constitution of 1901. *Delview Meadow Gold Division Beatrice Foods Co. et al. v. Alabama Dairy Commission*, 383 So.2d 511 (Ala.1978). The Circuit Court delayed the hearing and ruling in this case until the United States Court of Appeals for the Fifth Circuit rendered its decision in *Dairymen, Inc. v. Alabama Dairy Commission*, 584 F.2d 707 (1978), where it held Alabama's milk quota regulations in ADC Order 3-75-1, to which Order 2-76 is an amendment, unconstitutional since those regulations conflict with the commerce clause of the Constitution. On March 12, 1979, the lower court issued a decree holding that ADC Order 2-76 did not violate the due process provisions of the United States and Alabama Constitutions.

Simply stated, Order 2-76 requires that if a milk distributor receives surplus milk (Class II milk) from the farmer-producer, the distributor may choose to use it in making buttermilk or not, but if he makes and sells buttermilk made from milk powder, he must pay for an equivalent portion of the surplus milk just as though such surplus milk had been used in making the buttermilk; that is, at the Class I price.[1] A carryover provision allows the farmer-producer, when he has not shipped surplus milk equal to his share of the distributor's sale of buttermilk made from milk powder, to receive a credit which can be carried until he actually ships surplus milk.

1. Class I milk prices, fluid milk prices, are higher than Class II milk prices, the prices paid for surplus milk. Class I milk or fluid milk includes all homogenized milk, pasteurized milk, premium milk, low fat milk, skim milk, buttermilk, chocolate milk, flavored milk and milk drinks, buttermilk produced from non-fat milk powder, and shrinkage, excluding swill returns, which exceed 2% if milk is received on farm weights or 1½% if milk is received on other than farm weights. Class II milk includes milk used in the plant for cottage cheese, soft serve mixes, sour cream, yogurt, dips, dressing, shrinkage, swill returns, dumpage, fluid cream products containing 10% or more butterfat, and milk delivered to non-Grade A plants.

The distributors contend that Order 2–76 deprives them of their property without due process of law by requiring them to make compensatory payments to milk producers for surplus milk they never actually use in making buttermilk. They also argue that Order 2–76 should be held unconstitutional and void since it is merely an amendment to Order 3–75–1, determined to be unconstitutional by the United States Court of Appeals.

[5] A state may not act to deprive any person of his property without due process of law. *U. S. Const.* amend. XIV; *Ala. Const.* art. 1 § 6. ADC Order 2–76, however, deprives distributors of their property, money, in a manner that is arbitrary and unreasonable. The distributors' money is taken by the ADC to be paid to producers for milk presently or subsequently received but never used in making the buttermilk. Although the money taken is designed as "compensatory payments" such payments are effectively a tax or penalty for the benefit of the producers on the distributors for their use of milk powder. Other courts have recognized that payments labeled compensatory may be more accurately described as penalties on milk distributors. *See, Kass v. Brannan*, 196 F.2d 791 (2d Cir. 1951). The ADC by this penalty arbitrarily and unreasonably discriminates against a legitimate production process.

In *Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 223 S.E.2d 323 (1976), the Supreme Court of North Carolina in considering the North Carolina Milk Commission's amendment to Milk Marketing Order No. 2, requiring distributors reconstituting milk for Class I sales to pay to producers selling milk to other distributors in the market area an amount equal to the difference between the Class I and normal Class II prices, stated:

> "To interpret GS 106–266.8 [the amendment] as conferring upon the Commission power to require a distributor of 'reconstituted' milk to make such payments for the benefit of producers, with whom it has no dealings, would also give rise to serious doubt as to whether such exaction would be a violation of Article I, § 19, of the Constitution of North Carolina, which provides, 'No person shall be * * * in any manner deprived of his * * * property, but by the law of the land.'"

[6] The ADC lacked authority under Title 22, § 223(1), Code of Alabama (Recomp. 1958) (as amended) to promulgate an order that in effect requires distributors to pay the premium Class I price for milk not used in a premium product. See Code 1975, §§ 2–13–50 and 51. The distributors will have to pay the Class I price for milk whenever they make buttermilk from milk powder irrespective of whether they do so for greater profit, convenience, because no fresh milk is available, or only sporadically. The milk that they are required to purchase for premium prices, even though it is not used in making buttermilk, is actually milk which is produced in excess of what is needed for fluid milk consumption and thus should come under the lower minimum price, Class II price. Whether the ADC computes the amount of milk for which the distributors pay the Class I price, the fluid milk price, on the basis of any one of the three methods allowed by the statute, Order 2–76 is still arbitrary and unreasonable and thus violates the due process provisions of the Constitution of the United States and the Constitution of Alabama 1901.

[7] We hold that the unconstitutionality of Order 2–76 relates back to the date of its adoption—not from the date of this decision.

REVERSED AND RENDERED.

TORBERT, C. J., and BLOODWORTH and JONES, JJ., concur.

SHORES and BEATTY, JJ., concur in the result.

MADDOX, EMBRY and ALMON, dissent.

SHORES, Justice (concurring in the result).

I concur in the result only because I think we are bound, at least by principles of comity, to follow the U. S. Fifth Circuit Court of

Appeals' view of the federal constitutionality of the involved regulations.

BEATTY, J., concurs.

MADDOX, Justice (dissenting).

This case, involving Pricing Order 2–76, has had a long and tortuous journey. The facts are sufficiently set out in an opinion, which I authored, in *Alabama Dairy Commission v. Delview Meadow Gold*, 345 So.2d 278 (Ala.1977). Joining me then were Chief Justice Torbert, Justices Almon, Shores, Embry and Beatty. Justice Jones concurred in the result, and Justices Bloodworth and Faulkner, dissented. On that appeal, a majority of this Court upheld the Order 2–76, and as I expressed in a dissenting opinion, on June 30, 1978, all the constitutional claims advanced by the distributors on that first appeal were *submitted* and decided adverse to them; nevertheless, a majority (5–4) of this Court allowed the distributors to litigate again in the circuit court what they dubbed a "due process" claim. I must respectfully point out that the "due process" issue was presented by the distributors in their original petition for certiorari in the circuit court wherein they sought review of Order 2–76, and I must further point out that the constitutional issue was extensively argued in brief on the first appeal in this case.

While the matter was pending before the circuit court, an entirely different action was proceeding through the Federal District Court, which culminated in a decision by the Fifth Circuit Court of Appeals that Alabama Dairy Commission Order 3–75–1, to which Order 2–76 was an amendment, was unconstitutional as violative of the interstate commerce clause. *Dairymen, Inc. v. Alabama Dairy Commission*, 584 F.2d 707 (5th Cir. 1978). As I understand it, the Dairy Commission no longer enforces that order; nevertheless, the result reached today will determine who is entitled to more than 2 million dollars involved in Order 2–76.

The circuit court found that, irrespective of the decision in *Dairymen v. Alabama Dairy Commission, supra*, the distributor's "due process" claim was not meritorious. I think that the circuit court was correct. I personally think that the Fifth Circuit decision is in error, because I do not believe it follows prior decisions of the Supreme Court of the United States in milk regulation matters; nevertheless, even assuming the correctness of the Fifth Circuit decision, I do not believe that Order 2–76 would be invalid. In short, I think that the trial judge could have found that the purpose and goal of Order 2–76 was employed, not solely for the economic well-being of producers, but was designed also for consumer protection, in that, unregulated sales of buttermilk made from powder would be destructive by reason of the potential disturbance of the balanced distribution structure in Alabama built up during years of regulation. The uncontradicted testimony was that Alabama was a "deficit" milk producing state, and that failure to regulate the distribution and sale of buttermilk made from powder would aggravate this situation. Unless *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934), has been overruled, I thought a state could guarantee a fresh, wholesome supply of milk—a legitimate consumer interest.

"Due process" means fundamental fairness. Under Order 2–76, the distributors were not forced to buy milk they did not need, they were only required to pay a higher price for Class II milk if they bought and used powder, based upon the amount of buttermilk made from powder. I think it only incidental that the powder came across state lines. Order 2–76 would have required the same procedure for powder purchased in Alabama. In short, I see no conscious attempt to burden interstate commerce.

Under Order 2–76, the distributors were allowed a *regulated* price for the buttermilk which the distributors made from powder; therefore, they received an economic advantage of buying powder at a cheaper price and getting a *higher regulated price* from the consumer. Using a balancing approach, I would uphold the trial judge's finding that the "due process" clause was not vio-

lated. In *Great Atlantic and Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976), the Supreme Court stated that where the purpose and goal of the restriction employed is consumer protection and not the economic well-being of the present milk industry, and the means chosen do not involve an attempt to control commerce in another state or otherwise to produce an extraterritorial effect, and does not operate to discriminate against or place an embargo on interstate commerce, the obvious local interest at stake outweighs whatever national interest there might be in the prevention of the state restrictions having an incidental impact on interstate commerce. Furthermore, I do not find that Order 2-76 is substantially different in its effect from milk orders issued by other states or by the federal government dealing with buttermilk. I do not find that it is unfair to the distributors. Consequently, I respectfully dissent.

EMBRY, J., concurs.

APPENDIX "B"

ALABAMA DAIRY COMMISSION, and Associated Milk Producers, Inc.

v.

DELVIEW MEADOW GOLD DIVISION, BEATRICE FOODS COMPANY, et al.

SC 1814.

Supreme Court of Alabama.

April 15, 1977.

Rehearing Denied May 20, 1977.

In a suit instituted by petition for certiorari to review an order of the State Dairy Commission, the Circuit Court, Montgomery County, William F. Thetford, J., invalidated the order. The Commission and an intervenor appealed. The Supreme Court held that factual findings were supported by the record and justified classification and pricing action taken by the Commission in permitting producers to share in profits made by distributors on their sales of buttermilk made from milk powder.

Reversed and remanded.

Jones, J., filed an opinion concurring in result.

Faulkner, J., dissented and filed opinion in which Bloodworth, J., concurred.

1. Food ⇐4.5(5)

Factual findings were supported by record and justified classification and pricing action taken by State Dairy Commission in permitting producers to share in profits made by distributors on their sales of buttermilk made from milk powder. Code of Ala., Tit. 22, § 223(1).

2. Food ⇐1.8(4)

It is not duty of courts to devise scheme for regulating fluid milk industry, but rather such job belongs to State Dairy Commission. Code of Ala., Tit. 22, § 223(1).

3. Food ⇐1.8(4)

Scope of review by Supreme Court of orders of State Dairy Commission is to determine whether order is unlawful, and what should be legal conclusion from facts found; review by certiorari includes determination by circuit court whether order is unreasonable based on facts found, but not determination whether facts found by Commission are true upon consideration of evidence, and where there is some evidence on which to base such finding, rule of review as contemplated by statute is satisfied. Code of Ala., Tit. 22, § 223(1).

Charles M. Crook, Montgomery, for Alabama Dairy Com'n.

Henry C. Chappell, Jr., Montgomery, for Associated Milk Producers, Inc.

Curtis H. Springer, Montgomery, for appellees.

PER CURIAM.

This appeal involves an order of the Alabama Dairy Commission which permits producers to share in the profits of sales of buttermilk made from milk powder.

Succinctly stated, Order 2–76 required that if a distributor receives surplus milk from the farmer, the distributor can use it in making buttermilk or not as he sees fit, but if he sells milk made from powder, he must pay for an equivalent portion of the farmer's surplus milk *as though* such surplus milk had been used to make the buttermilk, that is, at the Class I price.

In order to compensate the distributor, in part, for this increased cost of manufacturing buttermilk from powder, the Commission increased the wholesale price of buttermilk, whether made from powder or fresh skim milk. In other words, the Commission continues to *regulate* the price of buttermilk whether made from powder or fresh skim milk. An example of how the Commission order would work is, as follows: Assume that during the month of June, a farmer ships 1,000 pounds of milk to a distributor. At the end of the month, the farmer's pro rata share of the distributor's sales are as follows: 600 pounds of the farmer's milk was used to make homogen-

ized milk (Class I) and 400 pounds was used to make yogurt, or was resold to a cheese manufacturer (Class II). The distributor's records also show that it sold 300 pounds of buttermilk made from powdered milk. Under the old pricing structure, the farmers would have received the Class I price for 600 pounds of milk, and the Class II price for 400 pounds of milk. The distributor would have paid the farmer nothing from its buttermilk sales, and would have realized the entire profit, which the record before the Commission shows was considerable because the raw product cost of powder was *unregulated* but the sales price of buttermilk made from powder was *regulated*. Under the new regulation, the farmer gets to share in this profit. He would be paid for 900 pounds of milk at the Class I price, and 100 pounds of milk at the Class II price. The extra cost to the distributor is the difference between the Class I and Class II prices. In order to compensate the distributor for this increased cost, the Commission increased the wholesale price which he may charge the retailer.

Under the order, the farmer gets the Class I price for the distributor's buttermilk sales *only* if the farmer *at some point* ships an equivalent amount of milk. The regulation does have a "carryover" provision, strenuously objected to by the distributors, which operates as follows: If a farmer has not shipped "surplus" milk equal to his share of the plant's sales of buttermilk made from powder, he does not get paid for such share. However, he gets a "credit" which may be carried forward to succeeding months. If the farmer later ships "surplus" milk to the plant *equal* to his credited share of earlier sales of buttermilk made from powder, he gets the Class I price for this milk. The farmer never gets paid for milk he does not deliver, but under the "carryover" provisions, it is possible for a distributor's buttermilk sales to give rise to a Class I price for "surplus" milk which was not delivered until after the month in which the buttermilk sales occurred.

Distributors, unhappy with Order 2–76, asked the Circuit Court of Montgomery County to review it. That court, citing this Court's case of *Dark's Dairy v. Alabama State Milk Control Board*, 278 Ala. 693, 180 So.2d 527 (1965), held it to be invalid, as being beyond the powers of the Commission. The Commission appealed. We reverse.

At first blush, it would seem that *Dark's Dairy* would control this case because *Dark's Dairy*, too, involved a classification and pricing order of the old Milk Board involving sales of buttermilk made from powder. However, it is apparent from a close reading of *Dark's Dairy* that this Court did not hold in that case that a milk regulatory Commission was powerless, *under all fact situations*, to classify and regulate the price of buttermilk made from powder.

In *Dark's Dairy*, the producers argued essentially what the Commission argues here, namely:

> "Counsel for the producers argue in support of that portion of Order 1–63 now being considered, that unless the classification of non-fat buttermilk is on the 99% sales basis, a distributor could by reconstituting buttermilk from milk powder and other ingredients diminish his needs for fresh milk for buttermilk purposes, and thereby increase the amount of surplus milk with a resulting decrease in the blend price paid the producer."

This Court answered that argument, as follows:

> "The record is devoid of evidence tending to show what percentage of non-fat or cultured buttermilk is manufactured from fresh milk or what percentage is reconstituted from milk powder and other elements. Without such evidence it must appear that the classification of non-fat buttermilk on the basis of the sales of 99% of all buttermilk, that is that made from fresh milk and that made from powder, etc., can only be deemed as arbitrary. It cannot be determined from the record why the figure was set at 99% of sales, rather than 95%, or 80%, etc."

Here, unlike the situation in *Dark's Dairy*, there was substantial evidence presented,

and based on this evidence, the Dairy Commission made the following findings of fact:

"3. Approximately three-fourths of the buttermilk processed and distributed by licenses of the Commission is made from non-fat milk powder. In the absence of adequate regulations the sales of fluid buttermilk processed from non-fat milk powder are lost to producers.

"4. The cost of producing buttermilk from non-fat milk powder is less than producing buttermilk from fresh Class I skim milk. This cost difference creates the incentive to produce buttermilk from non-fat milk powder.

"5. Some distributors are producing buttermilk from fresh Class I skim milk and some are producing buttermilk from non-fat milk powder, thus creating a disparity of costs among distributor licenses.

"6. Present wholesale and retail prices for buttermilk do not adequately reflect the cost of producing said buttermilk using fresh Class I skim milk.

"7. Wholesale and retail prices for buttermilk can be adjusted to adequately reflect the cost of producing buttermilk from fresh Class I skim milk and give the consuming public an adequate supply of high quality buttermilk at a fair price.

"8. The use of fresh Class I skim milk in the production of buttermilk will tend to stimulate more production of milk in Alabama."

[1] These findings are supported by the record and justify the classification and pricing action taken by the Commission, acting pursuant to the authority granted it by Section 20 of Act No. 408, Acts of Alabama, 1971, p. 1097, [carried as Title 22, § 223(1), Code of Alabama, 1940, Recompiled, 1958, (1973 Cumulative Supplement)], which provides, in part:

"When in the judgment of the dairy commission, it is necessary or advisable, due to seasonable fluctuations or other unstable conditions, in order to promote a proper balance between the supply of and the demand for milk, to fix a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption, the dairy commission may establish the quantity of milk for which the distributor or milk dealer shall pay the fluid or base milk price, and may establish a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption. For this purpose, the dairy commission may compute said quantity upon a uniform system of plant usage, classifying milk according to its various usage and establishing different minimum prices which the milk dealer or distributor shall pay for each classification, or the dairy commission may, if it deems it most advisable, establish a base surplus system, placing all milk sold by a plant for fluid milk consumption, including all milk as defined in the definition of fluid milk in one classification, establishing a minimum price therefor and all milk processed by such distributor or milk dealer into by-products into another classification, and fixing a lesser minimum price for said surplus milk so used in the by-products classification, *or the dairy commission may use a combination of both systems.* The dairy commission shall have authority to use the different systems of classifications in different milk sheds or different localities of the state as it deems most advisable to carry out the provisions of this chapter. The dairy commission shall have the power to establish uniform rules and regulations for the apportionment of this quota of base milk among the various producers who furnish such distributors and milk dealers with their regular milk supply used for such purposes, and may adopt such systems for the apportionment of such base or higher price classification of milk among the several producers as it may determine to be the most just and equitable in the administration of this chapter. For this purpose, the dairy commission may require any milk dealer or distributor to supply necessary information about the quantity of milk received from the producers during a specified period of time, and any other information necessary for the determination of this matter. The

dairy commission may determine the minimum price to be received by producers for milk within the quota of base or higher price classification of milk and for surplus milk or milk in excess of such producers quota. Each order fixing minimum price or handling charges may classify milk for forms, classes, grades, or use as the dairy commission may deem advisable and may specify the minimum price in each classification, grade or use as the dairy commission may determine. [Emphasis added.]"

If Order 2–76 is invalidated, it is reasonable to assume that the previous inequitable and inconsistent pricing system for buttermilk would continue under which a distributor would share a *regulated* wholesale price for buttermilk, whether made from powder or fresh skim milk, but would have an *unregulated* raw product cost, thereby throwing *substantial* quantities of fresh skim milk into the Class II price, and consequently injuring the producers. Order 2–76 attempted to remedy this inequity and inconsistency, and also attempted to stimulate milk production in Alabama. We find Order 2–76 is reasonable.

[2] It is not the duty of the courts to devise the scheme for regulating the fluid milk industry. That job belongs to the Alabama Dairy Commission.

[3] Our duty is to review the orders of the Dairy Commission under the rule of review set out in *Alabama Jersey Cattle Club v. Alabama State Milk Control Board*, 274 Ala. 611, 150 So.2d 711 (1963), as follows:

"• • • (1) Matters for the judicial tribunal are whether the order is unlawful, and what should be the legal conclusion from the facts found. (2) The review by certiorari includes a determination by the circuit court of whether the order is unreasonable based on the facts so found, but not a determination of whether the facts found by the board are true upon a consideration of the evidence. (3) Where there is some evidence on which to base such a finding, this satisfies the rule of review as contemplated by the statute."

After reviewing Order 2–76 under the rule enunciated in *Alabama Jersey Cattle Club*, we are of the opinion that the judgment of the circuit court is due to be reversed.

REVERSED AND REMANDED.

TORBERT, C. J., and MADDOX, ALMON, SHORES, EMBRY and BEATTY, JJ., concur.

JONES, J., concurs in the result.

BLOODWORTH and FAULKNER, JJ., dissent.

JONES, Justice (concurring in the result):

I concur in the result. I agree that *Dark's Dairy* is not controlling in that the evidence lacking in *Dark's Dairy* has been supplied in the case at bar. But this is not to say that I agree with those conclusionary statements in the majority opinion going to the overall authority of the Commission. In view of pending litigation, contesting on constitutional grounds the Dairy Commission's legal existence, I reserve the expression of any opinion on the Commission's power to exercise any regulatory authority over the dairy industry until these issues are presented in an adversary context. No such constitutional attack is here presented.

FAULKNER, Justice (dissenting).

I dissent.

This case results from the fact that Bossy, the cow, and the consumer can not get together. At a time when she is producing the most milk, the consumer is drinking it the least. Surpluses, therefore, are created because Bossy can not be turned off. What to do, and how to compensate the producer for this surplus milk confronted the Commission. From its deliberation, Order No. 2–76 was adopted.

Order No. 2–76 permitted farmers, as well as distributors, to receive a share of the profits from sales of buttermilk made from powder and allowed the distributors

to recoup most of the increased cost through an increase in their selling price. Producers are paid for the milk they deliver to a distributor according to the way the distributor uses the milk. Class I milk is sold by the distributor in fluid form and brings a higher price. Class II milk is that which is produced in excess of the Class I needs of the distributor and which, as a surplus, brings a lower price. Under Order No. 2–76 the distributor, if he received surplus milk, can use it in making buttermilk or he can use powder, but if he sells buttermilk made from powder, he must pay for an equivalent portion of the surplus milk as though the surplus milk had been used to make the buttermilk, i.e., at the Class I price. A carry-over provision allows a farmer, when he has not shipped surplus milk equal to his share of the plant's sale of buttermilk made from powder, a credit which can be carried until he does ship surplus milk.

Some distributors, including Delview Meadow Gold, filed a petition for certiorari in the Circuit Court of Montgomery County, asserting that the regulation was beyond the power of the Commission, that it was unreasonable and violated the due process clause of the United States Constitution, and that it imposed additional costs on them, thereby reducing their profit margin. The petition for certiorari was granted and the lower court invalidated the order as being contrary to *Dark's Dairy v. Ala. Milk Control Bd.*, 278 Ala. 693, 180 So.2d 527 (1965). The Alabama Dairy Commission and Associated Milk Producers, Inc., a milk farmer cooperative, appeal this decree.

The issue here is whether the Alabama Dairy Commission in promulgating Order No. 2–76 exceeded its power and authority under Title 22, §§ 205–31, Code of Ala. 1940 (Recomp.1958) (as amended), invalidating the order.

The Circuit Court found that Order No. 2–76 was contrary to *Dark's Dairy* and thus invalid. I agree with the lower court in holding that *Dark's Dairy* is controlling.

In that case this court considered a Milk Control Board order classifying fat buttermilk on the basis of sales of 99% of all buttermilk rather than on the distributor's usage of fresh milk. Order No. 2–76 is substantially similar to that earlier regulation, as both required distributors to account for sales of buttermilk as premium price sales, regardless of whether the buttermilk was made from fresh milk or powder.

The facts of the two cases are not significantly different. That here the Dairy Commission granted a concomitant price increase to allow the distributors to recoup most of their increased costs resulting from the new regulation, while it did not in *Dark's Dairy*, is irrelevant to the question of arbitrariness of the order.

In *Dark's Dairy* this court held that a regulation which results in producers being paid a premium price for milk that is surplus is beyond the power of the Board. Order No. 2–76 would bring the same results and is, therefore, beyond the power of the Commission. It does not matter whether the distributors use powder to make buttermilk all the time or only when there is an insufficient supply of fresh milk; the distributors will have to pay a Class I price for milk whenever they make their buttermilk from powder, for whatever reason, whether greater profit, convenience or necessity. This violates § 223(1) which states in pertinent part:

> "When in the judgment of the dairy commission, it is necessary or advisable, due to seasonable fluctuations or other unstable conditions, in order to promote a proper balance between the supply of and the demand for milk, to fix a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption, the dairy commission may establish the quantity of milk for which the distributor or milk dealer shall pay the fluid or base milk price, and may establish a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption. For this purpose, the dairy commission may compute said quantity upon a uniform system of *plant usage*, classifying milk

according to its various usage and establishing different minimum prices which the milk dealer or distributor shall pay for each classification, *or* the dairy commission may, if it deems it most advisable, establish a base surplus system, placing *all milk sold by a plant* for fluid milk consumption, including all milk as defined in the definition of fluid milk in one classification, establishing a minimum price therefor and all milk processed by such distributor or milk dealer into by-products into another classification, and fixing a lesser minimum price for said surplus milk so used in the by-products classification, *or the dairy commission may use a combination of both systems.*" (Emphasis added.)

The milk which the buttermilk distributor must buy under Order No. 2–76 is milk which is produced in excess of what is needed for fluid milk consumption and is thus due to come under the lesser minimum price, not the premium price. Whether the Commission computes the quantity of milk for which the distributor pays the fluid milk price upon a plant usage system, a plant sales system or a combination of both, Order No. 2–76 is arbitrary and unreasonable. The milk which the powder buttermilk distributors are required to purchase is neither used nor sold by the plant for fluid milk consumption but is nevertheless priced as such. The Commission lacks authority to pass an order that in effect makes distributors pay a premium price for milk not used in a premium product.

None of the arguments made by the Dairy Commission are sufficient to overrule *Dark's Dairy*. Therefore, the Circuit Court properly decided this case on the basis of *Dark's Dairy*.

I would affirm the trial court.

BLOODWORTH, J., concurs.

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Case No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1980

ALABAMA DAIRY COMMISSION AND ASSOCIATED MILK PRODUCERS, INC.,

Petitioners

vs.

DELVIEW MEADOW GOLD DIVISION, BEATRICE FOODS COMPANY, et al.,

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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APPENDIX "A"

REPRINTED FROM DELVIEW MEADOW, ETC. v. ALA. DAIRY COM'N
Ala., 383 So.2d 511

DELVIEW MEADOW GOLD DIVISION
BEATRICE FOODS COMPANY et al.

v.

ALABAMA DAIRY COMMISSION and
Associated Milk Producers, Inc.

SC 2716.

Supreme Court of Alabama.

June 30, 1978.

Rehearing Denied Aug. 4, 1978.

After Remand Sept. 28, 1979

Rehearing Denied May 9, 1980

[383 So.2d 511]

On review of an order of the Alabama Dairy Commission, the Circuit Court, Montgomery County, William Thetford, J., invalidated buttermilk regulation, and appeal was taken. The Supreme Court, 345 So.2d 278, held that buttermilk regulation was valid, and reversed and remanded. The Circuit Court denied milk distributors' post-judgment motions, and distributors appealed. The Supreme Court held that: (1) it would

not consider two additional constitutional contentions for the first time on appeal, but (2) cause would be remanded for consideration of merits of distributors' due process claims. On remand, the Circuit Court, Sam Taylor, J., held that buttermilk regulation did not violate due process, and milk producers again appealed. The Supreme Court, Faulkner, J., held that buttermilk regulation, which required milk distributor who sold buttermilk made from milk powder to pay for equivalent portions of surplus milk he received from farmer-producer just as if such surplus milk had been used in making buttermilk, deprived milk distributors of their property in arbitrary and unreasonable manner in violation of due process of law.

Reversed and rendered.

Maddox, J., filed a dissenting opinion in which Shores and Beatty, JJ., joined, and Embry, J., dissented from the Supreme Court's decision to remand case for consideration of the due process claim.

Shores, J., filed an opinion concurring in the result on the merits of the due process claim in which Beatty, J., joined.

Maddox, J., filed an opinion dissenting on the merits of the due process claim in

which Embry, J., joined.

[Headnote deleted]

[383 So.2d 512]

PER CURIAM.

This is an appeal by Delview Meadow Gold Division Beatrice Foods Company and others (hereinafter referred to as Distributors) involving Order 2-76 of the Alabama Dairy Commission. The order was previously declared valid by this court in "Alabama Dairy Commission v. Delview Meadow Gold Division, Beatrice Foods Company, et al.", 345 So.2d 278 (Ala. 1977).

Under current regulations promulgated by the Dairy Commission, milk producers are paid a Class I price by milk distributors for that portion of milk sold by the distributors for consumption as fluid milk. A much lower Class II price is paid for other milk purchased from the producers which is usually used in making cheese and other milk products. Order 2-76 changes this classification and pricing structure for buttermilk which is made from milk powder rather than fluid milk.

In making buttermilk, distributors may choose to use either fluid milk or cheaper milk powder. However, under the provi-

sions of Order 2-76, if a distributor receives surplus fluid milk from a producer and the distributor then manufactures and sells buttermilk made from milk powder, he must pay the producer for an equivalent portion of the producer's otherwise surplus milk at the Class I price "as though" such fluid milk had been used in making the buttermilk.

Order 2-76 further provides that distributors may pass increased costs resulting from the regulation on to consumers through an increase in the wholesale price of buttermilk.

The Dairy Commission enacted Order 2-76 on January 16, 1976. On February 9, 1976 the Distributors filed a timely petition for writ of certiorari in the Montgomery County Circuit Court seeking a review of the new regulation. It was alleged that Order 2-76 was invalid and violative of the Due Process Clause of both the state and federal constitutions.

On February 23, 1976 the trial court entered an order suspending the operation of Order 2-76 pending a final determination on its validity. The order further required the Distributors to monthly pay into an

escrow fund an amount equal to the difference between what was actually paid to producers and what would have been paid to them if Order 2-76 were in effect.

On April 7, 1976 the Montgomery County Circuit Court declared Order 2-76 invalid as being beyond the powers of the Dairy Commission. The decree was based upon this court's decision in "Dark's Dairy v. Alabama State Milk Control Board", 278 Ala. 693, 180 So.2d 527 (1965). The Dairy Commission then appealed the circuit court's ruling to this court.

On appeal the Distributors asserted that "Dark's Dairy" was controlling. They further argued the previously asserted "due process" claim as well as alleged violations of the Commerce Clause of the federal constitution and of the "equal protection" provisions of both the state and federal constitutions.

On April 15, 1977 a majority of this court reversed the circuit court's order, holding that "Dark's Dairy" was not controlling, and reversed and remanded the cause. This court did not address the asserted "due process" or "commerce clause" or "equal protection" claims in that opinion. These various constitutional challenges were once

again raised in the Distributors' application for rehearing which was denied on May 20, 1977.

The Distributors thereafter filed the following motions in Montgomery County Circuit Court: motion to set case for hearing on constitutional questions; motion to remand to the Dairy Commission; and motion to refund escrow fund (to the Distributors) or, in the alternative, motion to hold entire escrow fund intact pending completion of all judicial proceedings. In addition to these various motions, the Distributors filed an amendment to their original petition for certiorari which once again raised "due process," "commerce clause," and "equal protection" claims.

All motions and the amendment were denied by the trial court on June 16, 1977, and the escrow funds were disbursed. Notice of appeal to this court was filed by the Distributors from the June 16, 1977, order. A motion for summary dismissal was subsequently filed by the Dairy Commission on the grounds that the issues raised on this appeal were before the court in the prior appeal involving Order 2-76. The cause was thus submitted on the motion and the merits.

Briefly stated, the Distributors make

the following contentions on this appeal:

(1) Order 2-76 places a substantial burden on interstate trade of milk powder in violation of the Commerce Clause of the federal constitution;

(2) Order 2-76 violates the Distributors' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the federal constitution and similar provisions of the state constitution; and

(3) The June 28, 1976, trial court order was without jurisdiction to make any decree af-

[383 So.2d 514]

fecting the rights of the parties and was therefore null and void.

Title 22, section 226, Code of Alabama 1940 (§2 13 63, Code 1975), establishes the procedure for review of Dairy Commission orders. This statute provides in pertinent part as follows:

> "§226. Certiorari to review.- Any person affected by any order or action of the board, who deems himself aggrieved by any such order or act may within ten days after receiving notice of any such action or order, have such order, or action reviewed by a writ of certiorari by filing in the circuit court of the county wherein said action or order

> was taken or made, a verified petition setting out the specific order or action, or any part or parts thereof whereby said person deems himself aggrieved, and such court shall only consider such matters as contained in the petition. . . . [N]o new or additional evidence shall be taken or heard by the court. . . . Upon final hearing, such court shall have jurisdiction to reverse, vacate or modify the order complained of, if upon consideration of the issues before the court, the court is of the opinion the order is unlawful or unreasonable."

Under the clear wording of this statute, review by the circuit court of orders of the Dairy Commission must be limited to a consideration of the evidence presented in the hearing before the Dairy Commission and the issues contained in the petition for certiorari. No similar provision is made in Title 22, section 226, nor in any other statute specifically relating to the Dairy Commission, concerning review by this court of circuit court judgments. However, we have stated that on appeal of Dairy Commission actions this court is governed by the same rules of review as was the circuit court.

"White Way Pure Milk Company v. Alabama State Milk Control Board", 265 Ala. 660, 93 So.2d 509 (1957). Thus, in the present appeal, this court may only consider evidence placed in the first instance upon the record developed before the Dairy Commission and issues raised thereafter in the petition for certiorari to the circuit court.

[1] As previously stated, the Distributors did not assert their "commerce clause" and "equal protection" claims in the original petition for certiorari to the circuit court. Thus, under this court's interpretation of our rule of review under Title 22, section 226, we decline to consider these two contentions for the first time on this appeal.

[2] We note that Title 7, section 1072, Code of Alabama 1940 (§ 6-6-640, Code 1975), which governs the procedure for amending petitions for certiorari, states, in pertinent part, the following:

> ". . . any of the pleadings in such proceedings may be amended as often as occasion may require to attain the ends of justice, and by striking out parties and adding new parties; and upon the issues thus presented, the court shall award the relief, if any,

to which the petitioner is entitled." This statute pertains only to amendments while the "proceedings are in progress" and not to amendments after judgment. "Ex parte Hennies", 33 Ala. App. 229, 34 So.2d 17 (1947).

[3] Although we specifically decline to consider the merits of the Distributors' constitutional challenges to Order 2-76 based upon alleged "commerce clause" and "equal protection" violations, this cause must nevertheless be remanded to the circuit court for its consideration of a single issue--the Distributors' "due process" claim. We reach this result because the Distributors raised this constitutional claim in the original petition for certiorari. When the circuit court ruled that Order 2-76 was invalid, it did not need to address the "due process" issue because it held that "Dark's Dairy" was controlling. Upon review, this court did not address the alleged "due process" violation nor did we remand to the circuit court for its consideration thereof. We therefore believe this cause must be remanded now for a consideration by the circuit court of the merits of the Distributors' federal and state "due process" claim because this issue, though properly presented,

has never been ruled upon by either the circuit court or this court.

[4] The final contention made by the Distributors on this appeal, that the circuit court order of June 28, 1976, continuing the escrow fund arrangement created by that court on February 23, 1976, was null and void, is without merit.

> "In "Barran v. Roden", 263 Ala. 305, 307, 82 So.2d 398, 399 (1955), this Court set out a limitation on the rule that, after an appeal is taken, the trial court cannot rule on any matter involving the appeal:
>
> '. . . The rule is stated to be that after an appeal is taken, the lower court may proceed in matters which are entirely collateral to that part of the case which is taken up (by the appeal) but it can do nothing in respect to any matter or question which is involved in the appeal, and which may be adjudged by the appellate court.' This is a limitation on the rule that after an appeal is taken the trial court cannot, pending that appeal, pass upon any matter involved on the appeal . . ..

> 'As to those matters which are entirely collateral to the questions involved on appeal, the court and parties are free to proceed nothwithstanding the appeal if taken, or without affecting the right to appeal if not then taken. 4 C.J.S. Appeal and Error § 212e, p. 401.'
>
> "Accord: "Francis v. Scott, 260 Ala. 590, 72 So.2d 93 (1954); Ex Parte Taylor", 251 Ala. 387, 37 So.2d 656 (1948); "Ex Parte City Council of Montgomery", 114 Ala. 115, 14 So. 365 (1896)."

"Osborn v. Riley", 331 So.2d 268, 271 (Ala. 1976).

Accordingly, this cause is remanded to the circuit court for a consideration of the Distributors' claim that Order 2-76 violates the Due Process Clause of the federal constitution and similar provisions of the state constitution.

REMANDED WITH DIRECTIONS

TORBERT, C. J., and BLOODWORTH, FAULKNER, JONES and ALMON, JJ., concur.

MADDOX, J., with whom SHORES and BEATTY, JJ., join dissents.

EMBRY, J., dissents.

MADDOX, Justice (dissenting).

On the original appeal of this case, "Ala Dairy Com'n vs. Delview Meadow Gold, etc.", Ala., 345 So.2d 378 (1977), Delview spent several pages of its brief arguing that the trial court's order invalidating Order No. 2-76 was correct because "[a] state regulatory agency is prohibited from erecting trade barriers which are clearly a burden on interstate commerce between the several states."

On application for rehearing, Delview argued:

> "NUMEROUS LEGAL AND CONSTITUTIONAL ERRORS IN PER CURIAM OPINION
>
> "At the very outset, the per curiam opinion rendered herein permits Order 2-76 of the Alabama Dairy Commission to discriminate against the interstate sale of out-of-state powdered milk to milk distributors in Alabama in violation of the Commerce Clause of the United States Constitution, Article 1, § 10, clause 2 and § 8, clause 3. The per curiam opinion is also contrary to the statutory and case law of Alabama and is contrary to the principles of law enunciated in cases from the Supreme Courts of the States of North Carolina, Florida, Delaware, Pennsyl-

vania, New Jersey, Mississippi, Montana, Kentucky, Arizona and Colorado. The per curiam opinion is also expressly contrary to the decisions of the United States Supreme Court in "Baldwin v. Seelig", 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032; "Hood v. DuMond", 336 U.S. [525] 527, 69 S.Ct. 657, 93 L.Ed. 864 [865] "Dean Milk Co. v. City of Madison, Wisconsin", 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329; "Polar Ice Cream and Creamery Co. v. Andrews", 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389; and "Lehigh Valley Cooperative Farmers, Inc. v. United States", 370 U.S. 76, 82 S.Ct. 1168, 8 L.Ed.2d 345.

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"The per curiam opinion would also permit a violation of Appellees' constitutional rights under the due process clauses of the Constitutions of Alabama and the United States. "Arcadia Dairy Farms, Inc.", 289 N.C. 456, 223 S.E.2d 323.

ORDER 2-76 VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

"Although the constitutional question concerning violation of the Commerce

Clause by Order 2-76 was thoroughly argued in briefs, discussed in detail with the Court on oral argument, "and submitted as an issue in this case", the per curiam opinion fails to mention the Commerce Clause or even attempt to distinguish this case from the foregoing decisions of the united States Supreme Court and the highest Courts of ten sister states. . . ." [Emphasis added.]

I am of the opinion that arguments on the Federal constitutional question were initially considered, but unfortunately, as it turns out were not addressed by this Court in the original opinion. In other words, I am of the opinion that the Federal constitutional claim, even though not written to, was an issue in the original appeal and was decided adverse to Delview. Therefore, I naturally dissent.

SHORES and BEATTY, JJ., concur

AFTER REMAND

FAULKNER, Justice.

Order 2-76 of the Alabama Dairy Commission (the buttermilk regulation") is before us again. Delview Meadow Gold appeals from an order of the Circuit Court of Montgomery County which held that Order 2-76 did not violate the due process provisions of

the United States and Alabama Constitutions. We reverse.

On June 30, 1978, this case was remanded to the Circuit Court with directions that the court consider the claim made by Delview Meadow Gold and other distributors of dairy products that Order 2-76 of the Alabama Dairy Commission (ADC) violated the due process clause of the United States Constitution and similar provisions in the Alabama Constitution of 1901. "Delview Meadow Gold Division Beatrice Foods Co. et al. v. Alabama Dairy Commission", 383 So.2d 511 (Ala. 1978). The Circuit Court delayed the hearing and ruling in this case until the United States Court of Appeals for the Fifth Circuit rendered its decision in "Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (1978), where it held Alabama's milk quota regulations in ADC Order 3-75-1, to which Order 2-76 is an amendment, unconstitutional since those regulations conflict with the commerce clause of the Constitution. On March 12, 1979, the lower court issued a decree holding that ADC Order 2-76 did not violate the due process provisions of the United States and Alabama Constitutions.

Simply stated, Order 2-76 requires that if a milk distributor receives surplus milk (Class II milk) from the farmer-producer, the

distributor may choose to use it in making buttermilk or not, but if he makes and sells buttermilk made from milk powder, he must pay for an equivalent portion of the surplus milk just as though such surplus milk had been used in making the buttermilk; that is, at the Class I price.[1] A carryover provision

---

1. Class 1 milk prices, fluid milk prices, are higher than Class II milk prices, the prices paid for surplus milk. Class I milk or fluid milk includes all homogenized milk, pasteurized milk, premium milk, low fat milk, skim milk, buttermilk, chocolate milk flavored milk and milk drinks, buttermilk produced from non-fat milk powder, and shrinkage, excluding swill returns, which exceed 2% if milk is received on farm weights or 1 1/2% if milk is received on other than farm weights. Class II milk includes milk used in the plant for cottage cheese, soft serve mixes, sour cream, yogurt, dips, dressing, shrinkage, swill returns, dumpage, fluid cream products containing 10% or more butterfat, and milk delivered to non-Grade A. plants.

allows the farmer-producer, when he has not shipped surplus milk equal to his share of the distributor's sale of buttermilk made from milk powder, to receive a credit which can be carried until he actually ships surplus milk.

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The distributors contend that Order 2-76 deprives them of their property without due process of law by requiring them to make compensatory payments to milk producers "for surplus milk" they never actually use in making buttermilk. They also argue that Order 2-76 should be held unconstitutional and void since it is merely an amendment to Order 3-75-1, determined to be unconstitutional by the United States Court of Appeals.

[5] A state may not act to deprive any person of his property without due process of law. "U.S. Const. amend. XIV; Ala. Const." art. 1 § 6. ADC Order 2-76, however, deprives distributors of their property, money, in a manner that is arbitrary and unreasonable. The distributors' money is taken by the ADC to be paid to producers for milk presently or subsequently received but never used in making the buttermilk. Although the money taken is designed as "compensatory payments" such payments are effectively a tax or penalty for

the benefit of the producers on the distributors for their use of milk powder. Other courts have recognized that payments labeled compensatory may be more accurately described as penalties on milk distributors. See, "Kass v. Brannan", 196 F.2d 791 (2d Cir. 1951). The ADC by this penalty arbitrarily and unreasonably discriminates against a legitimate production process.

In "Appeal of Arcadia Dairy Farms, Inc.", 289 N.C. 456, 223 S.E.2d 323 (1976), the Supreme Court of North Carolina in considering the North Carolina Milk Commission's amendment to Milk Marketing Order No. 2, requiring distributors reconstituting milk for Class I sales to pay to producers selling milk to other distributors in the market area an amount equal to the difference between the Class I and normal Class II prices, stated:

> "To interpret GS 106266.8 [the amendment] as conferring upon the Commission power to require a distributor of 'reconstituted' milk to make such payments for the benefit of producers, with whom it has no dealings, would also give rise to serious doubt as to whether such exaction would be a violation of Article I, § 19, of the Constitution of North Carolina, which provides, 'No person shall be. . . in any manner de-

prived of his . . . property, but by the law of the land.'"

[6] The ADC lacked authority under Title 22, § 223(1), Code of Alabama (Recomp. 1958) (as amended) to promulgate an order that in effect requires distributors to pay the premium Class I price for milk not used in a premium product. See Code 1975, §§ 2-13-50 and 51. The distributors will have to pay the Class I price for milk whenever they make buttermilk from milk powder irrespective of whether they do so for greater profit, convenience, because no fresh milk is available or only sporadically. The milk that they are required to purchase for premium prices, even though it is not used in making buttermilk, is actually milk which is produced in excess of what is needed for fluid milk consumption and thus should come under the lower minimum price, Class II price. Whether the ADC computes the amount of milk for which the distributors pay the Class I price, the fluid milk price, on the basis of any one of the three methods allowed by the statute, Order 2-76 is still arbitrary and unreasonable and thus violates the due process provisions of the Constitution of the United States and the Constitution of Alabama 1901.

[7] We hold that the unconstitutionality of Order 2-76 relates back to the date of its adoption--not from the date of this decision.

REVERSED AND RENDERED.

TORBERT, C. J., and BLOODWORTH and JONES, JJ., concur.

SHORES and BEATTY, JJ., concur in the result.

MADDOX, EMBRY and ALMON, dissent.

SHORES, Justice (concurring in the result).

I concur in the result only because I think we are bound, at least by principles of comity, to follow the U. S. Fifth Circuit Court of

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Appeals' view of the federal constitutionality of the involved regulations.

BEATTY, J., concurs.

MADDOX, Justice (dissenting).

This case, involving Pricing Order 2-76 has had a long and tortuous journey. The facts are sufficiently set out in an opinion, which I authored, in "Alabama Dairy Commission v. Delview Meadow Gold", 345 So.2d 278 (Ala. 1977). Joining me then were Chief Justice Torbert, Justices Almon, Shores,

Embry and Beatty. Justice Jones concurred in the result, and Justices Bloodworth and Faulkner, dissented. On that appeal, a majority of this Court upheld the Order 2-76, and as I expressed in a dissenting opinion, on June 30, 1978, all the constitutional claims advanced by the distributors on that first appeal were submitted and decided adverse to them; nevertheless, a majority (5-4) of this Court allowed the distributors to litigate again in the circuit court what they dubbed a "due process" claim. I must respectfully point out that the "due process" issue was presented by the distributors in their original petition for certiorari in the circuit court wherein they sought review of Order 2-76, and I must further point out that the constitutional issue was extensively argued in brief on the first appeal in this case.

While the matter was pending before the circuit court an entirely different action was proceeding through the Federal District Court, which culminated in a decision by the Fifth Circuit Court of Appeals that Alabama Dairy Commission Order 3-75-1, to which Order 2-76 was an amendment, was unconstitutional as violative of the interstate commerce clause. "Dairymen, Inc. v. Alabama

Dairy Commission", 584 F.2d 707 (5th Cir. 1978). As I understand it, the Dairy Commission no longer enforces that order; nevertheless, the result reached today will determine who is entitled to more than 2 million dollars involved in Order 2-76.

The circuit court found that, irrespective of the decision in "Dairymen v. Alabama Dairy Commission, supra", the distributor's "due process" claim was not meritorious. I think that the circuit court was correct. I personally think that the Fifth Circuit decision is in error, because I do not believe it follows prior decisions of the Supreme Court of the United States in milk regulation matters; nevertheless, even assuming the correctness of the Fifth Circuit decision, I do not believe that Order 2-76 would be invalid. In short, I think that the trial judge could have found that the purpose and goal of Order 2-76 was employed, not solely for the economic well-being of producers, but was designed also for consumer protection, in that, unregulated sales of buttermilk made from powder would be destructive by reason of the potential disturbance of the balanced distribution structure in Alabama built up during years of regulation. The uncontradicted testimony was that Alabama

was a "deficit" milk producing state, and that failure to regulate the distribution and sale of buttermilk made from powder would aggravate this situation. Unless "Nebbia v. New York", 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934), has been overruled, I thought a state could guarantee a fresh, wholesome supply of milk--a legitimate consumer interest.

"Due process" means fundamental fairness. Under Order 2-76, the distributors were not forced to buy milk they did not need, they were only required to pay a higher price for Class II milk if they bought and used powder, based upon the amount of buttermilk made from powder. I think it only incidental that the powder came across state lines. Order 2-76 would have required the same procedure for powder purchased in Alabama. In short, I see no conscious attempt to burden interstate commerce.

Under Order 2-76, the distributors were allowed a "regulated" price for the buttermilk which the distributors made from powder; therefore, they received an economic advantage of buying powder at a cheaper price and getting a "higher regulated price" from the consumer. Using a balancing approach, I would uphold the trial judge's finding that the "due

process" clause was not vio-

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lated. In "Great Atlantic and Pacific Tea Co., Inc. v. Cottrell", 424 U.S. 366, 96 S.Ct. 923, 47 L.3d.2d 55 (1976), the Supreme Court stated that where the purpose and goal of the restriction employed is consumer protection and not the economic well-being of the present milk industry, and the means chosen do not involve an attempt to control commerce in another state or otherwise to produce an extraterritorial effect, and does not operate to discriminate against or place an embargo on interstate commerce, the obvious local interest at stake outweighs whatever national interest there might be in the prevention of the state restrictions having an incidental impact on interstate commerce. Furthermore, I do not find that Order 2-76 is substantially different in its effect from milk orders issued by other states or by the federal government dealing with buttermilk. I do not find that it is unfair to the distributors. Consequently, I respectfully dissent.

EMBRY, J., concurs.

APPENDIX "B"

REPRINTED FROM
ALABAMA DAIRY COMMISSION v.
DELVIEW MEADOW GOLD, Ala.,
345 So.2d 278 (1977)

ALABAMA DAIRY COMMISSION, and
Associated Milk Producers, Inc.

v.

DELVIEW MEADOW GOLD DIVISION,
BEATRICE FOODS COMPANY, et al.

SC 1814.

Supreme Court of Alabama.

April 15, 1977.

Rehearing Denied May 20, 1977.

[345 So.2d 278]

In a suit instituted by petition for certiorari to review an order of the State Dairy Commission, the Circuit Court, Montgomery County, William F. Thetford, J., invalidated the order. The Commission and an intervenor appealed. The Supreme Court held that factual findings were supported by the record and justified classification and pricing action taken by the Commission in permitting producers to share in profits made by distributors on their sales of buttermilk made from milk powder.

Reversed and remanded.

Jones, J., filed an opinion concurring in result.

Faulkner, J., dissented and filed opinion in which Bloodworth, J., concurred.

(Headnotes deleted)

PER CURIAM.

This appeal involves an order of the Alabama Dairy Commission which permits producers to share in the profits of sales of buttermilk made from milk powder.

Succinctly stated, Order 2-76 required that if a distributor receives surplus milk from the farmer, the distributor can use it in making buttermilk or not as he sees fit, but if he sells milk made from powder, he must pay for an equivalent portion of the farmer's surplus milk as "though" such surplus milk had been used to make the buttermilk, that is, at the Class I price.

In order to compensate the distributor, in part, for this increased cost of manufacturing buttermilk from powder, the Commission increased the wholesale price of buttermilk, whether made form powder or fresh skim milk. In other words, the Commission continues to "regulate" the price of buttermilk whether made from powder or fresh skim milk. An example of how the Commission order would

work is, as follows: Assume that during the month of June, a farmer ships 1,000 pounds of milk to a distributor. At the end of the month, the farmer's pro rata share of the distributor's sales are as follows: 600 pounds of the farmer's milk was used to make homogen-

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ized milk (Class I) and 400 pounds was used to make yogurt, or was resold to a cheese manufacturer (Class II). The distributor's records also show that it sold 300 pounds of buttermilk made from powdered milk. Under the old pricing structure, the farmers would have received the Class I price for 600 pounds of milk, and the Class II price for 400 pounds of milk. The distributor would have paid the farmer nothing from its buttermilk sales and would have realized the entire profit, which the record before the Commission shows was considerable because the raw product cost of powder was "unregulated" but the sales price of buttermilk made from powder "was regulated". Under the new regulation, the farmer gets to share in this profit. He would be paid for 900 pounds of milk at the Class I price, and 100 pounds of milk at the Class II price. The extra cost to the distributor is the difference between

the Class I and Class II prices. In order to compensate the distributor for this increased cost, the Commission increased the wholesale price which he may charge the retailer.

Under the order, the farmer gets the Class I price for the distributor's buttermilk sales "only" if the farmer "at some point" ships an equivalent amount of milk. The regulation does have a "carryover" provision, strenuously objected to by the distributors, which operates as follows: If a farmer has not shipped "surplus" milk equal to his share of the plant's sales of buttermilk made from powder, he does not get paid for such share. However, he gets a "credit" which may be carried forward to succeeding months. If the farmer later ships "surplus" milk to the plant "equal" to his credited share of earlier sales of buttermilk made from powder, he gets the Class I price for this milk. The farmer never gets paid for milk he does not deliver, but under the "carryover" provisions, it is possible for a distributor's buttermilk sales to give rise to a Class I price for "surplus" milk which was not delivered until after the month in which the buttermilk sales occurred.

Distributors, unhappy with Order 2-76

asked the Circuit Court of Montgomery County to review it. The court, citing this Court's case of "Dark's Dairy v. Alabama State Milk Control Board", 278 Ala. 693, 180 So.2d 527 (1965), held it to be invalid, as being beyond the powers of the Commission. The Commission appealed. We reverse.

At first blush, it would seem that "Dark's Dairy" would control this case because "Dark's Dairy", too, involved a classification and pricing order of the old Milk Board involving sales of buttermilk made from powder. However, it is apparent from a close reading of "Dark's Dairy" that this Court did not hold in that case that a milk regulatory commission was powerless, "under all fact situations", to classify and regulate the price of buttermilk made from powder.

In "Dark's Dairy", the producers argued essentially what the Commission argues here, namely:

> "Counsel for the producers argue in support of that portion of Order 1-63 now being considered, that unless the classification of non-fat buttermilk is on the 99% sales basis, a distributor could by reconstituting buttermilk from milk powder and other ingredients diminish his needs for fresh milk for buttermilk

purposes, and thereby increase the amount of surplus milk with a resulting decrease in the blend price paid the producer."

This Court answered that argument, as follows:

"The record is devoid of evidence tending to show what percentage of non-fat or cultured buttermilk is manufactured from fresh milk or what percentage is reconstituted from milk powder and other elements. Without such evidence it must appear that the classification of non-fat buttermilk on the basis of the sales of 99% of all buttermilk, that is that made from fresh milk and that made from powder, etc., can only be deemed as arbitrary. It cannot be determined from the record why the figure was set at 99% of sales, rather than 95%, or 80%, etc."

Here, unlike the situation in "Dark's Dairy, there was substantial evidence presented,

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and based on this evidence, the Dairy Commission made the following findings of fact:

"3. Approximately three-fourths of the buttermilk processed and distributed by licenses of the Commission is made from

non-fat milk powder. In the absence of adequate regulations the sales of fluid buttermilk processed from non-fat milk powder are lost to producers.

"4. The cost of producing buttermilk from non-fat milk powder is less than producing buttermilk from fresh Class I skim milk. This cost difference creates the incentive to produce buttermilk from non-fat milk powder.

"5. Some distributors are producing buttermilk from fresh Class I skim milk and some are producing buttermilk from non-fat milk powder, thus creating a disparity of costs among distributor licenses.

"6. Present wholesale and retail prices for buttermilk do not adequately reflect the cost of producing said buttermilk using fresh Class I skim milk.

"7. Wholesale and retail prices for buttermilk can be adjusted to adequately reflect the cost of producing buttermilk from fresh Class I skim milk and give the consuming public an adequate supply of high quality buttermilk at a fair price.

"8. The use of fresh Class I skim milk in the production of buttermilk will tend to stimulate more production of

milk in Alabama."

[1] These findings are supported by the record and justify the classification and pricing action taken by the Commission, acting pursuant to the authority granted it by Section 20 of Act No. 408, Acts of Alabama, 1971, p. 1097, [carried as Title 22, § 223(1), Code of Alabama, 1940, Recompiled, 1958, (1973 Cumulative Supplement)], which provides, in part:

> "When in the judgment of the dairy commission, it is necessary or advisable, due to seasonable fluctuations or other unstable conditions, in order to promote a proper balance between the supply of and the demand for milk, to fix a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption, the dairy commission may establish the quantity of milk for which the distributor or milk dealer shall pay the fluid or base milk price, and may establish a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption. For this purpose, the dairy commission may compute said quantity upon a uniform system of plant usage, classifying milk according to its

various usage and establishing different minimum prices which the milk dealer or distributor shall pay for each classification, or the dairy commission may, if it deems it most advisable, establish a base surplus system, placing all milk sold by a plant for fluid milk consumption, including all milk as defined in the definition of fluid milk in one classification, establishing a minimum price therefor and all milk processed by such distributor or milk dealer into by-products into another classification, and fixing a lesser minimum price for said surplus milk so used in the by-products classification, "or the dairy commission may use a combination of both systems." The dairy commission shall have authority to use the different systems of classifications in different milk sheds or different localities of the state as it deems most advisable to carry out the provisions of this chapter. The dairy commission shall have the power to establish uniform rules and regulations for the apportionment of this quota of base milk among the various producers who furnish such distributors and milk dealers with their regular milk

supply used for such purposes, and may adopt such systems for the apportionment of such base or higher price classification of milk among the several producers as it may determine to be the most just and equitable in the administration of this chapter. For this purpose, the dairy commission may require any milk dealer or distributor to supply necessary information about the quantity of milk received from the producers during a specified period of time, and any other information necessary for the determination of this matter. The

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dairy commission may determine the minimum price to be received by producers for milk within the quota of base or higher price classification of milk and for surplus milk or milk in excess of such producers quota. Each order fixing minimum price or handling charges may classify milk for forms, classes, grades, or use as the dairy commission may deem advisable and may specify the minimum price in each classification, grade or use as the dairy commission may determine. [Emphasis added.]"

If Order 2-76 is invalidated, it is reasonable to assume that the previous inequitable and inconsistent pricing system for buttermilk would continue under which a distributor would share a "regulated" wholesale price for buttermilk, whether made from powder or fresh skim milk, but would have an "unregulated" raw product cost, thereby throwing substantial quantities of fresh skim milk into the Class II price, and consequently injuring the producers. Order 2-76 attempted to remedy this inequity and inconsistency, and also attempted to stimulate milk production in Alabama. We find Order 2-76 is reasonable

[2] It is not the duty of the courts to devise the scheme for regulating the fluid milk industry. That job belongs to the Alabama Dairy Commission.

[3] Our duty is to review the orders of the Dairy Commission under the rule of review set out in "Alabama Jersey Cattle Club v. Alabama State Milk Control Board", 274 Ala. 611, 150 So.2d 711 (1963), as follows:

> ". . . (1) Matters for the judicial tribunal are whether the order is unlawful, and what should be the legal conclusion form the facts found. (2) The re-

view by certiorari includes a determination by the circuit court of whether the order is unreasonable based on the facts so found, but not a determination of whether the facts found by the board are true upon a consideration of the evidence. (3) Where there is some evidence on which to base such a finding, this satisfies the rule of review, as contemplated by the statute."

After reviewing Order 2-76 under the rule enunciated in "Alabama Jersey Cattle Club", we are of the opinion that the judgment of the circuit court is due to be reversed.

REVERSED AND REMANDED.

TORBERT, C. J., and MADDOX, ALMON, SHORES, EMBRY and BEATTY, JJ., concur.

JONES, J., concurs in the result.

BLOODWORTH and FAULKNER, JJ., dissent.

JONES, Justice (concurring in the result):

I concur in the result. I agree that "Dark's Dairy" is not controlling in that the evidence lacking in Dark's Dairy has been supplied in the case at bar. But this is not to say that I agree with those conclu-

sionary statements in the majority opinion going to the overall authority of the Commission. In view of pending litigation, contesting on constitutional grounds the Dairy Commission's legal existence, I reserve the expression of any opinion on the Commission's power to exercise any regulatory authority over the dairy industry until these issues are presented in an adversary context. No such constitutional attack is here presented.

FAULKNER, Justice (dissenting).

I dissent.

This case results from the fact that Bossy, the cow, and the consumer cannot get together. At a time when she is producing the most milk, the consumer is drinking it the least. Surpluses, therefore, are created because Bossy cannot be turned off. What to do, and how to compensate the producer for this surplus milk confronted the Commission. From its deliberation, Order No. 2-76 was adopted.

Order No. 2-76 permitted farmers, as well as distributors, to receive a share of the profits from sales of buttermilk made from powder and allowed the distributors

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to recoup most of the increased cost through

an increase in their selling price. Producers are paid for the milk they deliver to a distributor according to the way the distributor uses the milk. Class I milk is sold by the distributor in fluid form and brings a higher price. Class II milk is that which is produced in excess of the Class I needs of the distributor and which, as a surplus, brings a lower price. Under Order No. 2-76 the distributor, if he received surplus milk, can use it in making buttermilk or he can use powder, but if he sells buttermilk made from powder, he must pay for an equivalent portion of the surplus milk as though the surplus milk had been used to make the buttermilk, i.e., at the Class I price. A carry-over provision allows a farmer, when he has not shipped surplus milk equal to his share of the plant's sale of buttermilk made from powder, a credit which can be carried until he does ship surplus milk.

Some distributors, including Delview Meadow Gold, filed a petition for certiorari in the Circuit Court of Montgomery County, asserting that the regulation was beyond the power of the Commission, that it was unreasonable and violated the due process clause of the United States Constitution, and that it

imposed additional costs on them, thereby reducing their profit margin. The petition for certiorari was granted and the lower court invalidated the order as being contrary to "Dark's Dairy v. Ala. Milk Control Bd.", 278 Ala. 693, 180 So.2d 527 (1965). The Alabama Dairy Commission and Associated Milk Producers. Inc., a milk farmer cooperative, appeal this decree.

The issue here is whether the Alabama Dairy Commission in promulgating Order No. 2-76 exceeded its power and authority under Title 22, §§ 205-31, Code of Ala. 1940 (Recomp. 1958) (as amended), invalidating the order.

The Circuit Court found that Order No. 2-76 was contrary to "Dark's Dairy" and thus invalid. I agree with the lower court in holding that "Dark's Dairy" is controlling.

In that case this court considered a Milk Control Board order classifying fat buttermilk on the basis of sales of 99% of all buttermilk rather than on the distributor's usage of fresh milk. Order No. 2-76 is substantially similar to that earlier regulation, as both required distributors to account for sales of buttermilk as premium price sales, regardless of whether the buttermilk was made from fresh milk or powder.

The facts of the two cases are not significantly different. That here the Dairy Commission granted a concomitant price increase to allow the distributors to recoup most of their increased costs resulting from the new regulation, while it did not in "Dark's Dairy", is irrelevant to the question of arbitrariness of the order.

In "Dark's Dairy" this court held that a regulation which results in producers being paid a premium price for milk that is surplus is beyond the power of the Board. Order No. 2-76 would bring the same results and is, therefore, beyond the power of the Commission. It does not matter whether the distributors use powder to make buttermilk all the time or only when there is an insufficient supply of fresh milk; the distributors will have to pay a Class I price for milk whenever they make their buttermilk from powder, for whatever reason, whether greater profit, convenience or necessity. This violates § 223(1) which states in pertinent part:

> "When in the judgment of the dairy commission, it is necessary or advisable, due to seasonable fluctuations or other unstable conditions, in order to promote a proper balance between the supply of

and the demand for milk, to fix a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption, the dairy commission may establish the quantity of milk for which the distributor or milk dealer shall pay the fluid or base milk price, and may establish a lesser minimum price for milk which is produced in excess of what is needed for fluid milk consumption. For this purpose, the dairy commission may compute said quantity upon a uniform system of "plant usage", classifying milk

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according to its various usage and establishing different minimum prices which the milk dealer or distributor shall pay for each classification, or the dairy commision may, if it deems it most advisable, establish a base surplus system, placing "all milk sold by a plant" for fluid milk consumption, including all milk as defined in the definition of fluid milk in one classification, establishing a minimum price therefor and all milk processed by such distributor or milk dealer into by-products into another classification, and fixing

a lesser minimum price for said surplus milk so used in the by-products classification, "or the dairy commission may use a combination of both systems." (Emphasis added.)

The milk which the buttermilk distributor must buy under Order No. 2-76 is milk which is produced in excess of what is needed for fluid milk consumption and is thus due to come under the lesser minimum price, not the premium price. Whether the Commission computes the quantity of milk for which the distributor pays the fluid milk price upon a plant usage system, a plant sales system or a combination of both, Order No. 2-76 is arbitrary and unreasonable. The milk which the powder buttermilk distributors are required to purchase is neither used nor sold by the plant for fluid milk consumption but is nevertheless priced as such. The Commission lacks authority to pass an order that in effect makes distributors pay a premium price for milk not used in a premium product.

None of the arguments made by the Dairy Commission are sufficient to overrule "Dark's Dairy". Therefore, the Circuit Court properly decided this case on the basis of "Dark's Dairy".

I would affirm the trial court.

BLOODWORTH, J., concurs.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 80-305

ALABAMA DAIRY COMMISSION AND
ASSOCIATED MILK PRODUCERS, INC.,

Petitioners,

vs.

DELVIEW MEADOW GOLD DIVISION,
BEATRICE FOODS COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review by certiorari a decision by the Supreme Court of Alabama holding that a mere amendment to an unconstitutional order of the Alabama Dairy Commission is also unconstitutional when the state court decision was in accord with a final decision of the federal courts in the case of Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (5th Cir. 1978)?

STATEMENT OF THE CASE

On January 16, 1976, the Alabama Dairy Commission (ADC) issued Order 2-76 as an amendment to ADC Order 3-75-1. The purpose of Order 2-76 was to force milk distributors to use locally produced fluid milk in making buttermilk rather than out-of-state powdered milk. To accomplish this purpose, Order 2-76 established a system of compensatory payments from milk distributors for the benefit of milk producers so that distributors who made buttermilk from powdered milk (rather than from fluid milk) would nevertheless be required to pay the highest Class I price for the producers' surplus

fluid milk which was not used by the distributors in making buttermilk.

The parent regulation of Order 2-76 was declared unconstitutional by the U.S. Court of Appeals for the Fifth Circuit in Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (5th Cir. 1978). Petitioners in the present case were the losing parties in Dairymen. In accord with Dairymen and other federal and state cases, the Alabama Supreme Court declared Order 2-76 in violation of the due process clauses of the United States and Alabama Constitutions.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Alabama is accurate and correct and reached the right result and the opinion below is in accord with the decision of the U.S. Court of Appeals for the Fifth Circuit in Dairymen, Inc. v. Alabama Dairy Commission, supra, and other federal and state cases. The petition for a writ of certiorari should therefore be denied.

ARGUMENT

The decision of the Alabama Supreme Court in this case is in accord with the recent decision in Dairymen, Inc. v. Alabama Dairy Commission, 584 F.2d 707 (5th Cir. 1978). The Court in Dairymen declared unconstitutional ADC Order 3-75-1, which established a system of milk quota regulations for the State of Alabama. ADC Order 2-76, which is at issue in the present case, is a mere amendment to the unconstitutional Order 3-75-1.

Petitioners in the present case were also the losing parties in Dairymen. Petitioners failed to appeal the Dairymen decision to this Court, yet they persisted in their efforts in the Alabama State Courts to have the amendment to an unconstitutional order upheld. Obviously, if Petitioners were going to attempt to uphold Order 2-76, it would have been necessary for them to appeal the Dairymen decision to this Court and to attempt to convince this Court that the parent regulatory order was valid. Only if the original order was valid could an amendment to it possibly be valid.

However, after failing to appeal the Dairymen decision to this Court, Petitioners now seek certiorari here so they can ask this Court to reverse the decision of the Alabama Supreme Court and thereby uphold an amendment to an unconstitutional order. Petitioners are seeking to have this Court review by certiorari the constitutionality of an amendment to a regulatory order which has been finally declared to be unconstitutional by the Federal Courts. Such a petition is unrealistic on its face because the constitutional downfall of 3-75-1 automatically carried 2-76 down with it.

The amendment to Order 3-75-1 has no sensible meaning whatsoever without its inclusion as a part of Order 3-75-1. Order 2-76, alone, is unworkable, unenforceable, arbitrary, unreasonable and is an absolute nullity. It is a child without a legitimate parent. All courts have uniformly and universally recognized that an amendment can have no greater constitutional validity than the original order. Without Order 3-75-1, there is no milk quota system in Alabama. There is no Class I Milk. There is no Class II or Surplus Milk. There is simply no viable

milk regulatory scheme to which Order 2-76 can apply since the Alabama Milk Regulatory System is no longer in existence. Order 2-76 cannot give life to a dead regulation. It is not possible to graft a live tree on a dead tree; nothing from nothing can arise. Under no circumstances could 2-76 put life in the corpse of 3-75-1. Therefore, since the original regulation (3-75-1) is unconstitutional and void, the amending regulation (2-76) is likewise unconstitutional and void. Opinion of the Justices, 262 Ala. 180, 78 So.2d 1

In addition, even if the provisions of Order 2-76 were part of an otherwise constitutional milk regulatory system, they would still be unconstitutional because they take away the property (money) of the distributors in violation of due process of law. The decision of the Alabama Supreme Court shows this to be the case when it quotes with approval the reasoning in Kass v. Brannan, 196 F.2d 791 (2d Cir. 1951). Kass recognized that similar type payments labeled as "compensatory" may be more accurately described as "penalties" on milk distributors. Likewise, the Court below concluded that the compensatory payments required of

distributors by ADC Order 2-76 are, in effect, a penalty or tax on the distributors, arbitrarily and unreasonably discriminating against them for their use of a legitimate production process in making buttermilk (i.e., the use of powdered milk rather than fluid milk). It is undisputed that buttermilk is equally as wholesome, healthful and tasty regardless of whether it is made from powdered milk or fluid milk. Powdered milk is merely milk in a different form. At the time of Order 2-76, approximately three-fourths of all buttermilk being made and consumed in Alabama was made from powdered milk. Therefore, the Alabama Supreme Court very properly held that an arbitrary and unreasonable penalty or tax on the use of a legitimate production process is a violation of due process. This flagrant discrimination against a legitimate production process is what distinguishes 2-76 from the regulations upheld in the cases relied on by Petitioners.

Due process under the Constitution simply prohibits such discrimination by a state regulatory commission against one group of private citizens (distributors) for the sole benefit of another group of

private citizens (producers). The Court below accurately described the arbitrary and unreasonable nature of ADC Order 2-76 as follows:

> ". . .ADC Order 2-76, however, deprives distributors of their property, money, in a manner that is arbitrary and unreasonable. The distributors' money is taken by the ADC to be paid to producers for milk presently or subsequently received but never used in making the buttermilk. Although the money taken is designed as 'compensatory payments' such payments are effectively a tax or penalty for the benefit of the producers on the distributors for their use of milk powder. Other courts have recognized that payments labeled compensatory may be more accurately described as penalties on milk distributors. The ADC by this penalty arbitrarily and unreasonably discriminates against a legitimate production process." 383 So.2d 517 (Emphasis added)

In a very similar case, Appeal of Arcadia Dairy Farms, Inc., 223 S.E.2d 323 (N.C. 1976), the Supreme Court of North Carolina held that the North Carolina Milk Commission did not have the power to require a distributor who used reconstituted Wisconsin milk powder to

pay compensatory payments to North Carolina producers. The effect of ADC Order 2-76 is to require Alabama distributors who use milk powder in the production of buttermilk to pay compensatory payments to Alabama milk producers in a similar fashion.

The Court in Arcadia equated such payments with a tax and recognized that "there is no distinction between a tax and the payment required by the order of the Commission". Arcadia also recognized that even if the North Carolina statute had authorized such a milk order that there would be serious doubt it could be reconciled with the due process clause. The North Carolina Supreme Court points out that it is an unconstitutional violation of due process to levy a tax exclusively upon a particular group of companies for the special benefit of a particular group of people.

Petitioners attempt to make much in their brief of some federal regulations in federally regulated milk markets. Petitioners say that such federal regulations are similar to Order 2-76. Nothing in the world could be further from the truth because no milk regulation in the world could be

similar to 2-76, standing alone as it now does without 3-75-1. As shown, under such circumstances 2-76 is a meaningless nullity. It is a rudder without a ship. A limb without a tree. It is classification without subject matter.

Moreover, simply because the Federal Government may have issued some buttermilk regulations under federal law, this certainly did not authorize the Alabama Dairy Commission to impose an arbitrary and unreasonable order like 2-76 on Alabama distributors under Alabama law.

The federal regulations to which Petitioners refer are as different from 2-76 as night is from day. Petitioners are attempting to compare federal marketing orders to something that simply does not exist in Alabama.

However, it is significant that since the downfall of the milk regulatory system in Alabama, pursuant to Dairymen, the milk industry in Alabama is now in the process of changing over to a federally regulated system under the provisions of a federal milk marketing order which is authorized by Acts of Congress and which is in effect in many other states. This is an additional reason that certiorari

should be denied in this case because no questions involving ADC Order 2-76 will recur in the future.

Because it is so obvious that 2-76 is now unconstitutional, Petitioners, in effect, concede that 2-76 is invalid and has no future effect. On pages 42 and 43 of their brief filed herein, the Petitioners state and concede as follows:

> "Even if the amendatory 'buttermilk regulation' was rendered of no future effect by a decision in Dairymen, Inc., supra, or by the subsequent issuance of an injunction by Dairymen, Inc. trial court, it is clear from the context of the dispute in that case that the 'parent' regulation's (Order No. 3-75-1) invalidity dates prospectively from the issuance of the appellate opinion or trial court injunction."

Petitioners then proceed to argue that the unconstitutional declaration of 3-75-1 and 2-76 should have "prospect effect only". Their argument is clearly contrary to general law as declared by this Court and also to Alabama law.

The basic fallacy in such argument by Petitioners is that the constitutionality of 2-76 has been under legal attack from the date of its adoption. The

distributors have done all in their power to demonstrate the invalidity and unconstitutionality of 2-76 since day one when 2-76 was first adopted by the Dairy Commission.

Under such circumstances, the rule of law is that unconstitutional acts, in legal contemplation, are as inoperative as though they had never been passed or as if their enactment had never been written, and they are regarded as invalid or void from the date of enactment, and not from the date on which they are judicially declared unconstitutional. 16 C.J.S., pages 471 and 472.

In addition, all amendments to unconstitutional acts are, likewise, invalid (precisely the situation in the case at bar). This rule is stated in 16 C.J.S. at page 474 as follows:

> "Where a statute is declared unconstitutional, all acts whose effectiveness is made conditional on its validity are, likewise, invalid. So, all acts amendatory of an unconstitutional statute are without force and effect."

Alabama decisions are in accord. In Alabama it has also been stated that an unconstitutional statute is a void act as

if it had never been enacted, rights cannot be acquired under it, contracts and agreements depending solely upon it are void, it can protect no one, and no one can be benefited or required to respond in damages for refusing obedience. Norwood v. Goldsmith, 168 Ala. 224, 53 So.84.

Accordingly, since 2-76 has been under constant legal attack from the date of its adoption and has now been determined to be unconstitutional, it was void from the beginning.

Although the Alabama Supreme Court specifically declined to consider the question, Order 2-76 is also a clear violation of the Commerce Clause since all powdered milk is shipped into Alabama in interstate commerce. The attempt of the ADC to promote the economic welfare of local milk producers by insulating them from out-of-state competition is not a legitimate local interest to justify such absolute discrimination against powdered milk sold in interstate commerce. This Court has consistently so declared in many cases. See for example:

> Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 375 n.9, 84 S.Ct. 378, 386, 11 L.Ed.2d 389 (1964)

Dean Milk Co. v. Madison, 340 U.S. at 354, 71 S.Ct. at 297

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524, 55 S.Ct. 497, 500, 79 L.Ed. 1032 (1935)

CONCLUSION

Review on writ of certiorari is a matter of sound judicial discretion and will be granted only where there are special and important reasons therefor. There are no such special and important reasons for this Court to review a decision by the Supreme Court of Alabama declaring an amendment to an unconstitutional order of the Alabama Dairy Commission to also be unconstitutional. In this case, the Alabama Supreme Court carefully considered the relevant law and rendered a correct and fair decision. The decision is in accord with the Dairymen case and is supported by numerous other authorities. It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Opposition has been served upon counsel of record for Petitioners, Henry C. Chappell, Jr., P. O. Box 270, Montgomery, AL 36195 and Charles M. Crook, P. O. Box 78, Montgomery, AL 36101, by placing a copy of same in the United States mail, first-class postage prepaid, on this the 24TH day of September, 1980.

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